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**The Implementation of the Public Sector Equality Duty by Local  
Authorities: A Case Study of the London Borough of Southwark**

**Sylvanus Bisong Effiom**

**Thesis Submitted for the Degree of Doctor of Philosophy**

**London Middlesex University**

**October 2011**

### **Declaration**

The work presented in this thesis results from Mr Sylvanus Bisong Effiom's research at the Middlesex University School of Law.

**Sylvanus Bisong Effiom**

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### **Dedication**

This thesis is dedicated to my late mother, Mrs. Lucille Tabe Effiom, who never had the opportunity to see the fruits of her labour. This thesis is also dedicated to my dear father Willie Ndep Effiom. and to my lovely wife Mrs Dorote Tecla Effiom and our beloved children Lucille and Junior Effiom.

## **Acknowledgment**

---

Going through the doctoral program has been a most exciting, challenging and ultimately rewarding experience and it would be dishonest and very ungrateful on my part to a lot of individuals and organisations if I fail to acknowledge their contributions in seeing me through the process. In this regard, I would first like to thank my supervisor, Professor Malcolm Sergeant of the Middlesex University School of Law for accepting this project and giving his support and guidance over the years. Although from the start I had a very broad idea of what I was going to work on, my understanding of discrimination and equality law was very rudimentary. My legal writing had to be improved upon and the whole issue of what a PhD is all about was very hazy.

I consider myself very lucky to have had as first supervisor someone who is not only extremely patient but who understood from the beginning that there was a great deal that I had to learn. I will never be able to adequately express the extent of my gratitude to Professor Sergeant and how much his support has meant for my life. The same thanks and gratitude is owed to my co-supervisors, DR Maureen Spencer and Dr. Ericca Howard for their invaluable comments and guidance. A special gratitude is reserved for Professor Joshua Castellino, the Dean of the Middlesex University School of Law for agreeing to the university paying for a Reader to edit the footnotes of this dissertation and to Rachel Hutton of the University of Reading for accepting to and conscientiously editing the dissertation. Their contributions drew the line between success and failure to me.

My ambitions to undertake doctoral studies in the area of discrimination and equality law concretised after I was appointed as the secretary to the management Board of the Organisation of Blind Africans and Carribbeans in the UK. This event exposed me to the stark reality that discrimination against persons with disabilities go beyond individual acts of prejudice and stereotype and that persons with disabilities face formidable challenges to participation in the community as equal citizens due to systemic discrimination in our public services. In this respect, my special thanks goes to the director of OBAC who did not only provide me with an insight to the policy dimension to disability equality but also kindly

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## LIST OF CASES

---

### UK Cases

Appleby v Department for Works and Pensions (DWP) Lambeth County, Claim No LB001649.

Archibald v Fife Council (2004) UKHL 32, (2004) IRLR

A & B v. East Sussex CC [2003] EWHC 167

Attridge Law v Coleman [2007] IRLR 89.

Anufrijeva v Southwark London Borough Council [2003].

Baggley v Kingston-upon Hull Kingston upon Hull County Court, Claim No. KH101929.

Bernard v Enfield LBC (2000) EWHC 449.

Bruce v Chamberlain, [2004] EWCA Civ 1047.

Clark v Novacold [1999] IRLR 318(CA).

Collins v National Theatre (2004) IRLR) 395 (CA)

Cosgrove v Caesar and Howie [2001] IRLR, EAT

DM, R (on the application of) v Wigan Metropolitan Borough Council [2011] EWHC 2175 (Admin) CO/740/2011

Davies v Toys ‘R’ Us (1998) ET/1900286/98.

Dartford Borough Council v Richardson [2009] EAT 0031.

Elias v Secretary of State [2006] EWCA Civ 1293

Edwards’s v Mid Suffolk District Council [2001] ICR 616 (EAT).

Goodwin v The Patent Office [1999] IRLR 4.

HM Prison Service v Johnson (2007) IRLR 951 (EAT)

Heinz Co Ltd v Kenrick [2000] IRLR 144(EAT), Lindsay P.

Hammersmith and Fulham v Farnsworth [2000] IRLR 691

Hay v Surrey CC (2007) EWCA Civ 93.

Jones v University of Manchester (1993) IRLR. 218 (CA).

Jones v The Post Office [2001] EWCA Civ 558, [2001] ICR 805.

R (Kaur & Shah) v London Borough of Ealing & Anor [2008] EWHC 2062 (Admin).

Kenny v Hampshire Constabulary [1999] IRLR 76.

Lewisham v Malcolm [2008] UKHL 43, [2008] 3 WLR 194.

Morgan v Staffordshire University [2002] IRLR 190.

Mid Staffordshire NHS Trust v Cambridge (2003) IRLR 566 (EAT).



Nottinghamshire County Council v Meikle [2004] EWCA Civ 859.  
 O'Neil v Symm & Co [1998] ICR 481(EAT)  
 O'Hanlon v Commissioners Revenue and Customs (2006) IRLR 840 (EAT)  
 Project Management Institute v Latif (2007) IRLR 579(EAT).  
 Quinn v Schwarzkopf Ltd [2002] IRLR 602 (Court of Session).  
 R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141; [2008] LGR 239,  
 R v Haringey LBC exp. Norton (no.2) (1998) 1 CCLR 168.  
 R (Elaine McDonald) v Kensington & Chelsea RBC [2010] EWCA Civ 110.  
 R (Chavda) v Harrow London Borough Council (2007) EWHC 3064.  
 Roads v Central Trains (2004) EWCA Civ 1540  
 R v East Sussex CC ex Parte A and B High Court (Admin) CO/4843/2001, 18 February 2003.  
 R v Birmingham City Council and M, G and H v Birmingham City Council (co-joint appeals) [2011] EWHC 1147 (Admin).  
 Ross v Ryair and Stansted Airport Ross v Ryanair and Stanstead Airport Ltd (2004) EWCA Civ 1751.  
 Ridout v TC Group [1998] IRLR 628 (EAT).  
 R v Bristol City Council, ex p. Penfold [1998] 1 CCLR 315.  
 R v Gloucester, ex parte Barry [1997] AC 584, [1998] 2 ALL ER 770.  
 R v Secretary of State for the Home Department, ex Parte Daly [2001] UKHL 26, [2001] 2 WLR 1622.  
 R (Bernard) v Enfield LBC [2002] EWHC (Admin) 2282  
 R (J) v. Enfield London Borough Council [2002] EWHC 735 (Admin).  
 Scottish and Southern Energy v Mackay (2007) UK EATS/OO75/06/MT  
 Smith v Churchill Stairlifts (2005) EWCA Civ 1220.  
 Shaw and Co. Solicitors v Atkins (2009) UKEAT 0224-08-1102.  
 Surry Police v Marshall [2002] IRLR 843 (EAT).  
 Tarbuck v Sainsbury's Supermarkets (2006) IRLR 664(EAT).  
 Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] IRLR 613.  
 YL v Birmingham City Council [2007] UKHL 27 [2007] 3 WLR 112, HL.

## **European Cases**

Airey v Ireland (9 October 1979) Series A no. 32.

Autism-Europe v. France Complaint No. 13/2002, 4 November 2003.

Chacon Navas v Eurest Colectividades SA (Case C-13/05[2006].

Botta v Italy [1998] 26 ENRR 241.

Coleman v Attridge Law (Case C-303/06) [2008] 722 (ECJ).

Chacon Navas v Eurest Colectividades SA C-13/05[2006] ECR

D.H and Others v Czech Republic App. No. 57325/00, Judgement of the Court, 7 February 2006.

Marzari v Italy App no. 36448/97 (1999) 28 EHRR CD 175.

Mangold v Rudiger Helm C-144/04[2005] ECHI-9981

Nikky v the Netherlands (8 July 2003) Application no. 27677/02.

O'Reilley v Ireland (28 February 2002) Application No 54725/00.

Price v UK (2002) 34 EHRR 1285. Application No. 33394/96

Thlimmenos v Greece App. No. 34369/97[2000] ECHR 161, (2001) 31

Zehnalova and Zehnal v the Czech Republic (2002) Application No.38621/97

## **US and Canadian Cases**

Brown v. Board of Education, 347 US 483, 495 (1953).

Eldridge v British Columbia (1997)3 RCS 624

## **South African Cases**

Grootboom v Government of South Africa (2001 (1) SA (CC

## **LEGISLATIONS AND STATUTES**

---

### **United Kingdom**

The Equality Act 2010 (Specific Duties) Regulations 2011 SI No. 2260

The Local Government and Public Health Act 2007

The Welfare Act 2007

Disability Discrimination (Meaning of Disability) Regulations 1996, SI1996/1455.

Employment Equality (Age) Regulations 2006 (SI 2006/1031)

The Utilities Contracts Regulations (UCR) 2006.

Public Contracts Regulations (PCR) 2006

Equality Act 2006

Disability Discrimination Act 2005 (Amendment)

Disability Discrimination (Service Providers and Public Authorities Carrying Out Functions) Regulations 2005 SI 2005/2901.

Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966)

The Community Care Assessment Directions 2004

Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)

Race Relations (Statutory Duties) Order 2001 (SI 2001/3458)

Employment Protection Act 2000

The Human Rights Act 1998.

Housing Act 1996

Disability Discrimination Act 1995

NHS and Community Care Act (NHSCCA) 1990

Local Government and Housing Act 1989

Race Relations Act 1976

Sex Discrimination Act 1975

Local Authority Social Services Act 1970

Chronically Sick and Disabled Persons Act (CSDPA) 1970

National Assistance Act 1948.

Disabled Persons (Designated Employments) Order 1946 (SI 1946/1257)

Disabled Persons (Employment) Act 1944

## **Codes of Practice**

DRC, DDA 1995 Code of Practice: Employment and Occupation (London, Stationary Office, 2004).

DRC, DDA 1995 Code of Practice: Rights of Access-Services to the Public, Public Authority Functions, Private Clubs and Premises (London Stationery Office, 2006).

DRC, DDA 1995, The Duty to Promote Disability Equality: Statutory Code of Practice (England and Wales) (2005), Available at [www.drc-gb.org](http://www.drc-gb.org).

ECHR, Essential Guide to the Public Sector Equality Duty available at [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/PSED/essential\\_guide\\_guidance.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf)

## **EU Legislations**

Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Official Journal of the European Union L 134 of 30.4.2004, p. 1.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Official Journal of the European Union L 134 , 30/04/2004 P. 0114 – 0240

Directive 2002/14/EC establishing a Framework for informing and consulting employees

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe Treaty System (CETS) No. 164 (1997).

The Charter of Fundamental Rights of the European Union (Revised) 1996

The Charter of Fundamental Rights of the European Union 1961

The European Convention on Human Rights (ECHR) 1950

## **International Instruments**

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) 2008.

Standard Rules on the Equalisation of Opportunities for persons with disabilities adopted by General Assembly Resolution 48/96 of 20 December 1993.

The International Convention on Civil and Political Rights (ICCPR) 1966

The International Convention on Economic, Social and Cultural Rights (ICESC) 1966

The Universal Declaration of Human Rights 1948

## ABSTRACT

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Equality is a central concept in the development of a liberal society. However, its implementation in Britain raises issues of great concern to persons with disabilities. Such issues include the following: (i) the under representation of persons with disabilities in the labour force resulting in their over dependency on welfare benefits; (ii) the prevalence of institutional discrimination that has left public authorities unable to respond appropriately to the rights and felt needs of persons with disabilities; and (iii) the inadequacy of a regulatory framework to deal comprehensively with issues of societal discrimination against and marginalisation of persons with disabilities.

Using the London Borough of Southwark as a case study, this thesis finds that the statutory duty on public authorities to promote equality represents an advancement of the rights-based perspective of disability and that Southwark council seems to be moving closer to this position. However, the duty is still not being implemented fully in the way Parliament intended, resulting in the continuing failure to respect the rights of persons with disabilities to equality and non-discrimination. To resolve these deficiencies and on the basis of;

- (i) a comprehensive literature review,
- (ii) (ii) an analysis of the current legal and policy framework on disability discrimination and equality and of
- (iii) an empirical study of equality management in the London borough of Southwark for an exploration of the legal issues that flow from the implementation of the Equality duty by public authorities, The study exposes certain tensions between the twin currents of anti-discrimination legislation; positive duties and negative compliance, individual and group rights, equality and Human rights, reactive and anticipatory reasonable adjustments and makes practical suggestions for reconciling the two approaches. It also highlights certain issues of principle that should be addressed if the managerial thinking that drives the equality agenda in our local authorities is helpfully to adapt to the law. The study also highlights attractive features of the substantive equality paradigm for achieving

equality for persons with disabilities and stresses respect for the autonomy, independence and sense of dignity and self worth of this group of citizens. However, the picture that emerges is of a statutory landscape pulled in different directions. The culture of negative compliance may still have the upper hand in our local authorities, but it has not completely undermined the forces of rational change encapsulated in the duty on public authorities to promote equality. This is what makes critical theory possible and makes the presentation of this thesis a worthwhile endeavour.

This study is valid as of 10 October 2010.

## Chapter One: General Introduction and Methodology

### Overview.

The aim of this study is to investigate the implementation of the statutory duty on Public authorities to promote equality in the disability context.<sup>1</sup> The imposition of a statutory duty on Public authorities to promote equality is a relatively new approach to anti-discrimination in Britain and reflects recognition of the limits of the concepts of direct and indirect discrimination encapsulated in the conventional anti-discrimination legislation.<sup>2</sup> The duty encompasses a positive duty to promote equality, rather than just the negative requirement to refrain from discriminating and has taken diverse forms, ranging from the affirmative actions in the United States<sup>3</sup> to the Ontario Equal Pay Act 1987<sup>4</sup> and the Northern Ireland Act 1998.<sup>5</sup>

The failure of the conventional laws on anti-discrimination has meant the persistence of structural patterns of inequality in our communities. The effect of this is not only that far too many persons with disabilities still face persistent social and economic exclusion but also that

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<sup>1</sup> This project was commenced in 2006 under the now repealed Disability Discrimination Act 1995 and any reference to the Disability Equality Duty (DED) is reference to the statutory duty on equality. The expressions disabled persons, persons with a disability and persons with disabilities have been used interchangeably to refer to persons with disabilities and no special meaning should be attached to it.

<sup>2</sup> Professor Fredman refers to the imposition of statutory duties to promote equality as 'fourth generation equality law'; see generally, S. Fredman, *Discrimination Law*. Oxford, (OUP 2002) pp176-194. Also, C. O'cinneide, 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005). pp219-248.

<sup>3</sup> An Executive Order issued by President Johnson in 1965 requires private contractors and subcontractors which do business with federal government of the United States of America to 'take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, colour, religion, sex, or national origin.' Regulations issued under the Executive Order require that contractors examine whether their employment practices exclude, disadvantage or restrict employment opportunities for women or ethnic minorities and if they find that any group is under-represented, they are required to establish goals and timetables to eliminate the under-representation.

<sup>4</sup> In the domain of equal pay between men and women, the Act imposes a statutory duty on employers to identify pay discrimination and where necessary to initiate and implement pay adjustments.

<sup>5</sup> Section 75 of the Act imposes a statutory duty on public authorities to have due regard to the need to promote equality of opportunity in carrying out their functions. For details on the operationalisation of the duty, see generally C. McCrudden, 'Review of issues Concerning the Operationalisation of the Equality Duty' in E. McLaughlin, N. Faris(eds), *The Section 75 Equality Review-An Operational Review*(Belfast,2004). Also see Report on the Implementation of the Section 75 Equality and Good Relations Duties by Public Authorities, 1 January 2000-31 March 2002 (Equality Commission of Northern Ireland, Belfast 2003), available at <http://www.equalityni.org/archive/word/280503/finalfullS75report>.



their existence is one characterised by a persistent high levels of under-employment, inadequate access to basic social and welfare services, as well as daily occurrences of significant acts of discrimination.<sup>6</sup> The imperative of addressing these problems has led to the need for new equality strategies that are meant to deliver substantive equality to persons with disabilities and to combat their social exclusion.<sup>7</sup> Substantive rather than formal equality does not only require a positive duty to promote equality but also the restructuring of economic and social institutions in order to achieve proactive structural change.<sup>8</sup> The duty to promote equality potentially bridges the gap between the two traditional approaches to tackling inequality: the legal strategy encapsulated in the conventional anti-discrimination legislation and social welfare approach via social security legislations<sup>9</sup>.

In the disability context, the duty on public authorities to promote equality marks a shift in the equality paradigm, the most important been probably in the understanding of disability. Based on the social model of disability,<sup>10</sup> recognition has grown that where persons with disabilities face disadvantage this is not the inevitable consequence of the functioning of their body or mind. It is the failures to tackle barriers of environment, policy and attitude and to extend to persons with disabilities the same opportunities open to everyone else. This shift in the equality paradigm amounts to the assertion that persons with disabilities are not the problem and that they have rights. From the rights perspective the main problem lies in the

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<sup>6</sup> According to the Disability Rights Commission (DRC), one in five persons in the UK are disabled; of all people in Britain without any formal qualifications, over one-third are disabled while 40 per cent people of working age out of work are disabled. See the DRC's Disability Agenda: *Creating an Alternative Future*, February 2007 p. 11 The DRC was replaced by the Commission for Equality and Human Rights (CEHR) in October 2007.

<sup>7</sup> "Improving the Life Chances of Disabled People" (Cabinet Office, *Strategy Unit*, 2005).

<sup>8</sup> S. Fredman, 'Disability equality: A Challenge to the Existing Anti-Discrimination Paradigm' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe from Theory to Practice* (Hart Publishing, 2005) p. 214.

<sup>9</sup> S. Fredman, 'Equality: A New Generation?' (2001) Vol.30 No.2 *ILJ* pp.145-168. For the relationship between positive duties and substantive equality in the South African context, see S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights* pp163 – 190. Also, see M. Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution. Winter 2007.*Public law*.pp748-769. See also C. Baylies, 'Disability and the Notion of Human Development: questions of rights and capabilities *Disability & Society*, Vol. 17, No. 7, 2002, pp. 725-739.

<sup>10</sup> For a detailed analysis of the social construction of disability, see C. Barnes and G. Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Disability Press 2004).

inability of society to create space for persons with disabilities and not in the difference presented by disability itself.<sup>11</sup>

The new evolving human rights agenda for disability which Quinn<sup>12</sup> refers to as Public Freedom and encapsulated in the public sector duty to promote equality has much more to do with the empowerment of persons with disabilities to assume active lives and to participate in all aspects of the life of the community whether it be in the economic sphere, in the civil society, in the cultural life or in the social sphere. In this respect, the duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities. This is framed as a requirement on authorities to give 'due regard' to disability equality in its various dimensions. It is intended to be transformative; to change the practices of government and public authorities and make equality for persons with disabilities central to policy making and implementation. The Duty is rooted in the principle of community empowerment. The transformation of public services is to be achieved by engaging persons with disabilities as partners. A key purpose of the Equality Duty is to provide transparency between public authorities and persons with disabilities so that authorities can inform persons with disabilities about their actions to promote disability equality and those persons with disabilities are thereby able to hold the authority to account in delivery.<sup>13</sup>

The public sector duty to promote equality has not only moved the process of absorbing the rights-based perspective on disability into the corpus of the UK disability law forward to a considerable degree but has also provided new tools for promoting equality for persons with disabilities. In fact, the real significance of the duty to persons with disabilities may lie not only in the ideas it encapsulates but also in the way established institutions and practices are coming under sustained pressure for change. Significantly, Rights are no longer merely a 'fence' around persons with disabilities to protect them against individual acts of

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<sup>11</sup> G. Quinn, 'the Human Rights of People with Disabilities Under the EU Law' in P. Alston and M. Bustelo and others (eds), *The EU and Human Rights* (OUP, 1999) p. 281.

<sup>12</sup> G. Quinn *ibid.*

<sup>13</sup> ECHR, Essential Guide to the Public Sector Equality Duty available at [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/PSED/essential\\_guide\\_guidance.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf). With regard to the repealed Disability Equality Duty, see The DRC's The Duty to Promote Disability Equality: Statutory Code of Practice England and Wales. Also, C. Casserley, 'The disability Equality Duty and the Public Sector and its Legal Context,' (2007) available at [www.drc.gov.uk](http://www.drc.gov.uk). (Accessed July 2007).

discrimination but are mechanisms for empowering them to assume active life in their communities.<sup>14</sup>

However, a central concern with the duty to promote equality is the costs factor which has been identified as constituting ‘the hidden but powerful agenda behind much of equality policy and legislation.’<sup>15</sup> This has led Professor Quinn to reflect that there is a possibility that at some point the emphasis on positive measures to promote disability equality may result in a denial of essential social support to this group of citizens.<sup>16</sup> This may pose a serious challenge to the promotion of substantive equality for persons with disabilities, especially when it is acknowledged that reliance on formal measures is hardly enough protection against discrimination and marginalization. A concern here is whether this perspective is reflected in the implementation of the equality duty by local authorities. It must however be pointed out that, contrary to the general perception, the duty to promote disability equality does not necessarily amount to an automatic claim for greater resources. Rather, what it amounts to is a claim for public freedom and the right of persons with disabilities to participate in all facets of life on genuinely equal terms with everyone.<sup>17</sup> In the words of Fredman<sup>18</sup> ‘social rights refocus social welfare, not as a privilege but as a right.’

The public sector duty to promote equality is new and its ramifications are still not yet widely appreciated. The ideas it encapsulates could potentially be fundamentally corrosive of conventional or established ways of doing things. However, if implemented creatively by the relevant public authorities, it can inspire programmes which create pathways for persons with disabilities back into public space by questioning and injecting an ethic of rational justification into policy making and implementation.<sup>19</sup> This is especially so when one considers the fact that equality laws may cut across, and to some extent challenge, the approach to non-discrimination built into welfare state interventions.

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<sup>14</sup> G. Quinn, *supra* no.11p. 285.

<sup>15</sup> S. Fredman, *supra* no.8 .p. 208

<sup>16</sup> G. Quinn, *supra* no. 11.

<sup>17</sup> G. Quinn *ibid.*

<sup>18</sup> S. Fredman *supra* no. 8. p. 217.

<sup>19</sup> G. Quinn, *supra* no11. p. 289.

## **1. The Legislative and Statutory Framework.**

### **1.1 The Provisions of the Public Sector Equality Duty.**

Section 149 of the Equality Act 2010 introduced a new duty on Public authorities to promote equality when carrying out their functions. The duty consists of a general duty, set out in the Act itself as the Public Sector Equality Duty, and specific duties imposed through regulations.

#### **1.1.1 The General Duty.**

The general duty provide that a public authority must, in the exercise of its functions, have due regard not only to the need to eliminate discrimination, harassment and victimisation and to advance equality of opportunity between persons with disabilities and persons without disabilities but also to foster good relations between these groups of persons in the community.<sup>20</sup> The Act does not provide a precise definition of the term equality of opportunity but provide that advancing it involves:

- taking steps to remove or minimise disadvantages suffered by persons with disabilities that are connected to that disability;<sup>21</sup>
- taking steps to meet the needs of persons with disabilities that are different from the needs of persons who are not disabled;<sup>22</sup>
- encourage persons with disabilities to participate in public life or in any other activity in which participation by persons with disabilities is disproportionately low.<sup>23</sup>

The Act further provides that, in taking steps to meet the particular needs of persons with disabilities, public authorities must take account of their disability.<sup>24</sup> Taking account of a person's disability may, in certain instances mean treating that person more favourably than a person without a disability.<sup>25</sup>

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<sup>20</sup> Section 149 (1) Equality Act 2010.

<sup>21</sup> Section 149 (1) (a) Equality Act 2010.

<sup>22</sup> Section 149 (1) (b) Equality Act 2010.

<sup>23</sup> Section 149 (1) (c) Equality Act 2010.

<sup>24</sup> Section 149 (4) Equality Act 2010.

<sup>25</sup> Archibald v Fife Council [2004] UKHL 32.

The provisions of the Public Sector Equality Duty have a particular resonance to the section 49A general duty under the Disability Discrimination Act (DDA) 1995. Section 49A DDA 1995 created what was generally referred to as a “disability equality duty” requiring almost all public bodies to have, whilst carrying out their functions, due regard to the need to eliminate discrimination against, and harassment of persons with disabilities, to promote greater equality of opportunity for persons with disabilities, to promote positive images of, and the participation in public life of persons with disabilities , and to recognise that achieving equality for this group of citizens will at times require adjustments that will mean treating a person with a disability more favourably than a person without a disability.

### **1.1.2 Public Authorities and Functions.**

The Equality Act 2010 adopts an approach to the issue of the designation of covered public authorities in a different way by combining the various approaches applied in the preceding race, disability and gender equality duties. First, the term "public authority" has a limited meaning under the Act. According to Section 150(1) of the Act, a public authority is a person who is specified in Schedule 19. Thus, to the extent that there is no open-ended definition of Public Authority under S150 (1), it could be said that the Equality Act 2010 adopts a ‘closed list’ approach to the designation of public authorities subject to the general duty. The ‘closed list’ approach was applied under Section 71 of the Race Relations Act 1976 and its adoption by the Equality Act 2010 may have been informed by the desire to avoid any uncertainty which may result in extensive litigation attempting to set the parameters of what constitutes a Public Authority. However, the list of Public Authorities in Schedule 19 may be amended by ministerial order, so that new persons could be added on to the list. According to Section 151 (1) of the Act, a Minister of the Crown may by Order amend Part 1, 2 or 3 of Schedule 19.

The ‘closed list’ approach adopted in section 150(1) creates a firm public-private divide, raising questions as to the extent to which private bodies carrying out public functions are covered by the Public Sector Equality Duty. This question was particularly relevant under Section 49 of the Disability Discrimination Act (DDA), 1995 and Section 76 of the Sex Discrimination Act 1975 where the general duty applied to a body that exercises (functions of a public nature). This approach was similar to that adopted by the Human Rights Act (HRA)

1998 which adopted a broad definition of public authority, leaving it to subsequent discussion to determine which bodies were covered. Under the DDA 1995, the general understanding was that, since a Public Authority was a body exercising a public function, a private or voluntary sector body that contracts to provide functions previously provided by the public authority, will itself become a public authority when providing that function and therefore be covered by the general duties.<sup>26</sup> However, doubts were cast on this interpretation in the case of *YL v Birmingham City Council*<sup>27</sup> where, by majority the House of Lords found in the context of the HRA 1998 that a private care home providing accommodation under contract with a local authority was not itself exercising a public function. The decision of their Lordships was reached notwithstanding the fact that the function was performed pursuant to a statutory arrangement, at public expense and in the public interest.

The Equality Act 2010 has adopted both the ‘closed list’ approach applied under the Race Relations Act 1976 and the approach of the HRA 1998 with regard to defining those persons covered by the general duty. According to Section 150 (5) of the Act, A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998. The question whether a person who is not a public authority but who is carrying out a public function is covered by the general duty is now settled. According to s149 (2), such a person will be covered by the general duty in the exercise of those functions.

### **1.1.3 The Specific Duties.**

Both the DDA 1995 and the Equality Act 2010 contain provisions for specific duties which are designed to assist the public body by providing a structure for delivering on the general duty. However, the Specific duties under the Equality Act 2010 will come in to force after April 2011. This study was therefore conducted within the framework of the specific duties under the DDA 2005 Amendment as set out in the Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966).

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<sup>26</sup> The Duty to Promote Disability Equality DRC Statutory Code of Practice (England and Wales) (2005), DRC para 5.4 and 5.5.

<sup>27</sup> [2007] UKHL 27 [2007] 3 WLR 112, HL.

With regard to the specific duties under the Equality Act 2010, Section 153 of the Act gives the Secretary of State the power to impose specific duties through regulations. Schedule 19 of the Act list out the bodies subject to the Specific duties which are now contained in the Equality Act 2010 (Specific Duties) Regulations 2011 SI No.2260. The Specific duties require public authorities to publish a range of equality data relating both to their workforces and to the services they provide. There are three main identifiable parts of the duty; the duty to publish equality data, the duty to set equality objectives and the duty to publish transparently and proactively. Regulation 2 deals with the publication of equality data and requires relevant public authorities to publish at least annually information relating to how they have performed the general duty under section 149(1). In particular, the equality data must include information on how the body performed the assessments of the impact of its policies and practices, and the likely impact of its proposed policies and practices, on its ability to discharge its general duty. Unlike the DED that specifically required the involvement of persons with disabilities in the drawing up of the Equality Scheme, regulation 2 requires the public body only to publish details of any engagement that it undertook with persons whom it considered to have an interest in furthering the aims of the section 149 general duty. As is the case under the DED, Public bodies subject to the specific duty will also be expected to carry out an employment audit and monitoring of their work force and to publish the data annually. However, unlike the case with the DED, the employment monitoring obligation will apply only to organizations with 150 or more employees.

Regulation 3 is focused mainly on the equality objectives and requires the relevant public bodies to prepare and publish, every four years one or more specific and measurable objectives which, in the opinion of the authority, is important to achieve one or more of the aims of the general duty. Furthermore, the information provided by the authority must not only take into account any equality matters issued by a relevant minister but must also set out how progress towards the objectives should be measured. Regulation 4 lays down the publication standards which the public authority is expected to follow in publishing information about the equality data and objectives. According to the regulation, the equality data and objectives that a public body is required to publish can be published as part of another document. However, the information must be in a manner that is reasonably accessible to the public. The duty also establishes certain baseline transparency principles that are expected to guide public bodies in how they publish their data. Essentially, the publication of equality data must be consistent with the Public Data Principles set out by the Public Sector Transparency Board. A key

element of the requirement for transparent publication is that the data must be published proactively in a way that is open and freely available to third parties, such as community groups and equality campaigners who should be able to use the data in any lawful way without having to inform or obtain the permission of the public body concerned. In addition, public bodies will be required to provide information and support to enable the data to be reused easily and effectively.

A crucial difference between the Specific duties under the Equality Act 2010<sup>28</sup> and those under the provisions of the Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) relates to the requirement to produce and publish an Equality Scheme. The Specific duties under the Equality Act 2010 does not require relevant public authorities to produce and publish an Equality Scheme which was at the heart of the specific duties under the DDA 1995.<sup>29</sup> Essentially, the disability equality Schemes are delivery plans which involve policies and employment monitoring that support major public services in delivering on the general disability duty. These were designed to provide clear support for public authorities on how to deliver better policy and fairer services using the best of all talents. An underlining assumption of the legislation was that a Strong Scheme would provide the indispensable foundation for strong implementation of the general duties and outcomes.<sup>30</sup>

In particular, the disability equality Schemes must include an Action Plan setting out the steps an organisation would take to give ‘due regard’ to the need to prevent discrimination against and promote equality of opportunity for persons with disabilities. It must also set out how the authority will assess the impact of existing or proposed policies and practices on disability equality. The Scheme must be evidenced-based, showing not only what evidence the authority is collecting regarding its performance on disability equality but also must include a statement of the authority’s arrangements for gathering information on the effect of its policies and practices on persons with disabilities. In particular, the Scheme must provide information about an authority’s arrangements for gathering information and their effect on

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<sup>28</sup> The Equality Act 2010 (Specific Duties) Regulations 2011 SI No. 2260.

<sup>29</sup> Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) Reg 2.

<sup>30</sup> The Duty to Promote Disability Equality DRC Statutory Code of Practice (England and Wales) (2005), DRC.



the recruitment, development and retention of its employees with disabilities and the extent to which the services it provides and those other functions it performs take account of the needs of persons with disabilities.<sup>31</sup>

Furthermore, the legislation provides that the Schemes must set out how authorities are going to use the information which they gather to help them measure their performance on disability equality and the arrangements for reviewing on a regular basis the effectiveness of the action plan, and preparing subsequent Schemes.<sup>32</sup> Finally, the disability duty requires the authority to include in its disability equality scheme a statement of the steps the authority proposes to take towards the fulfilment of its general duty, and it must take the steps which it has set out in the scheme within three years of publication of the scheme. Public authorities subject to the specific duties under the Equality Act 2010 will not be under any legal obligation to develop and implement disability equality schemes or action plans nor involve persons with disabilities in the drawing up of any equality scheme or action plan of the authority as was the case under the DDA 1995. The removal of the legal obligation to involve persons with disabilities may reduce the bureaucratic burden on public authorities but this will no doubt represent a weakening of the rights afforded to this group of citizens under the legislation.

## **1.2 The Role of European Community (EC) Legislation.**

### **1.2.1 The EU Framework Directive**

Public authorities when developing and implementing their employment policies would have to consider the provisions of the EU Framework Directive on Equal Treatment in Employment and Occupation.<sup>33</sup> The Framework Directive aims at putting into effect in the member states the principle of equal treatment in the field of employment and occupation.<sup>34</sup> Though the principle of equal treatment is stated in Article 2(1) of the Directive to mean that there shall be no direct or indirect discrimination on the ground, inter alia, of disability, it may be possible to conclude from The decision of the European Court of

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<sup>31</sup> Section 2 (3) (d) (i) and (iii), Public Authorities Statutory Duty Regulations 2005 SI 2005 No. 2966.

<sup>32</sup> Section 2(3) (e), Public Authorities Statutory Duty Regulations 2005 SI 2005 No. 2966

<sup>33</sup> Council Directive 2000/78/EC of November 2000.

<sup>34</sup> Ibid Article 1

Justice (ECJ) in the *Mangold case*<sup>35</sup> that the human rights perspective provide the dominant rationale of the Directive. In that case the Court asserted that the sole purpose of the Directive is to lay down a general framework for combating discrimination in employment and that the directive does not itself lay down the principle of equal treatment. The principle of equal treatment derives from various international instruments such as human rights treaties and in the constitutional traditions common to the Member States.

Disability is one of the specified grounds of discrimination in the directive<sup>36</sup> and Article 5 provides for a duty of reasonable accommodation on employers, requiring them to take appropriate measures, when needed, to ensure that a person with a disability could have access to, participate in, and have advancement in employment? and undergo training. However, the duty is not absolute. Recital 21 provides that the duty is subject to the requirement that the accommodation will not place a 'disproportionate burden' on the employer. In determining whether or not a measure taken by an employer amounts to a 'disproportionate' burden, regard will be given to the financial and other costs entailed, the resources of the undertaking, and the possibility of public funding or other assistance for the accommodation.<sup>37</sup>

The provisions of Article 5 is reinforced by Article 7 which permits, in certain circumstances, positive actions in favour of an employee or applicant with a disability. Article 7 (1) stress that, in order to ensure the practical realisation of the principle of equal treatment, Member States are not prevented from 'maintaining or adopting specific measures to prevent or to compensate for disadvantages' linked to the relevant grounds of discrimination, including disability. The directive does not provide details on what type of positive measures may be permitted under article 7(1) but it is questionable whether legislative measures or practices that reserve certain categories of low status jobs for certain categories of workers with disabilities will be covered by the thrust of the directive.<sup>38</sup> However, it is plausible that a

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<sup>35</sup> *Mangold v Rudiger Helm* C-144/04[2005] ECHI-9981

<sup>36</sup> The Directive prohibits direct and indirect discrimination on the grounds of religion or belief, disability, age and sexual orientation.

<sup>37</sup> Recital 21, Council Directive 2000/78/EC of November 27 2000.

<sup>38</sup> For details on how the Directive impacts on disability equality and non discrimination, see generally G. Quinn, 'Disability Discrimination Law in the European Union' in H. Meenan (ed) *Equality Law in an Enlarged*

positive action measure that increases the awareness of the public in general and employers in particular on the need for a rational appraisal of the abilities of persons with disabilities is not likely to undermine the purpose of the directive.

On its part, Article 7(2) confers extremely wide latitude to Member States to permit employers to treat persons with disabilities more favourably than others. According to the section, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. The reference to Health and Safety in this context is significant as there is a possibility that employers might use health and safety concerns in order to exclude persons with disabilities from the workplace. In other words, health and safety concerns may become an obstacle to the achievement of a non-discriminatory and integrated workplace.<sup>39</sup>

This is particularly relevant in the light of the decision of the European Court of Justice in the Chacon Navas referral case<sup>40</sup> where it was held that sickness did not constitute a disability and that a worker who has been dismissed from his or her company solely because he or she was ill was not covered by the provisions of the directive. The main issue in this case was whether sickness or health status could be regarded as a disability for the purpose of the Framework Directive. The court pointed out that the use of the term 'disability' in Article 1 of the Directive meant that the legislature intended to distinguish it sharply from sickness and that the concept of 'disability' as used in the Directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person in professional life. The court also referred to the provisions of Article 16 of the Directive and concluded that the need for measures adapting the workplace meant that the disability

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*European Union: Understanding the Article 13 Directives* (Cambridge, Cambridge University Press 2010) pp231-277.

<sup>39</sup> J. Davies & W. Davies, 'Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State', Vol. 29, No. 4, *ILJ* December 2000. Pp 347-377.

<sup>40</sup> Chacon Navas v Eurest Colectividades SA C-13/05[2006] ECR 0000

had to be long term or carried a probability that it would last over a long time. The Chacon Navos ruling has been criticized for allowing financial considerations deliberately to sculpt the definition of disability and thus undermine the underlying goal of the Directive, contained in Recital 37, which is to provide a 'level playing field as regards equality in employment'.

It is submitted that, given its focus on adapting the workplace to suit the circumstances of the employee, health and safety law should be seen as complementing the non-discrimination principle of the directive rather than undermining it.<sup>41</sup> Such an approach to Health and Safety law will measurably enhance the success of the underlying anti-discrimination principle of the directive.

### **1.2.2 The Charter of Fundamental Rights of the European Union.**

The implementation of the duty on public authorities to promote equality will be animated further by the social rights and anti-discrimination ideals encapsulated in the Charter of Fundamental Rights of the European Union (European Social Charter). The Charter was adopted in 1961 and later on revised substantially in 1996. It sets out to protect a wide range of social rights in a number of fields of relevance to the lives of persons with disabilities such as employment, education, housing, social security and healthcare. In fact, while all the substantive articles of the Revised Charter have some application to persons with disabilities, Article 15 is focused more particularly on the rights of persons with disabilities without prejudice to the application of the rest of the legislation.<sup>42</sup>

The relevance of the European Social Charter to the Public sector equality duty could be located on three main levels. First, the Charter complements the Framework Directive in the domain of social and economic rights. The fact that the European Union was created primarily as a free trade zone meant that there was always a possibility of privileging economic freedoms over social rights and the European Social Charter gives the EU the potential to operate as a powerful structure for buttressing social rights against the

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<sup>41</sup> For an illustration of this point, see the UK case of *A & B v East Sussex CC* [2003] EWHC 167

<sup>42</sup> See generally G. Quinn, 'The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' in G. de Burca and B. de Witte (eds) *Social Rights in Europe* (OXFORD, OUP 2005) pp279-304.

‘race to the bottom’ created by the forces of economic rationality. To the extent that it creates a synthesis between economic and social aims, the public sector equality duty could be said to be at the heart of the synergy that ought to evolve between the Framework Directive and the European Social Charter at the national level. In other words, the duty provides a fertile soil for examining the conceptual and practical link between these two different legislations and the values they espouse.

A core value espoused by the European Social Charter is the prohibition of discrimination and the promotion of equality for persons with disabilities. Even though the 1961 Charter only referred to non-discrimination in its preamble, Article E of the revised version specifically prohibits discrimination in somewhat similar terms to those adopted in Article 14 of the European Convention on Human Rights (ECHR). Furthermore, Article 26 of the 1961 Charter calls on member states to recognise and respect the 'right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community while Article 34 states that the union recognizes and respects the entitlement to social security benefits and to housing and social assistance so as to ensure a decent existence for all those who lack sufficient resources.

Second, Professor Fredman has postulated that, in developing social rights to counterbalance economic freedoms, the European Social Charter has reformulated traditional notions of rights. Instead of creating rights in their traditional individualised, negative, judicially enforceable, and fault-based form, the charter espouses a proactive model which aims at institutional change, based on the notion of the active citizen and the centrality of participation in both rule formation and enforcement. Such a reformulation has a particular resonance to the Public sector equality duty which is not only built on a proactive model to equality but challenges Traditional conceptions of rights through mainstreaming and other proactive initiatives.<sup>43</sup> Furthermore, it is hoped that, by reconceptualising social rights not as burdens on business but as essential contributors to efficiency, the charter will assist the entry and integration of persons with disabilities in to the labour market. This

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<sup>43</sup> S. Fredman, ‘Transformation or Dilution: Fundamental Rights in the EU Social Space’ *European Law Journal*, Vol. 12, No. 1, January 2006, pp. 41–60.

point is of particular significance once it is acknowledged that disability has generally and mistakenly been taken as a proxy for economic inefficiency and any attempt to integrate persons with disabilities in to the labour market is automatically considered as costs-ineffective since it is simply presumed that persons with disabilities are less productive.

Third, the ability of non-governmental organisations and trade unions, amongst other actors, to initiate "collective complaints" under the auspices of the Charter has not only led to the production of a new body of case-law on discrimination issues but may prove to be of crucial importance to the many organizations of persons with disabilities who will be monitoring the implementation of the Public sector equality duty in the context of disability. Of particular significance here is the case of *Autism-Europe v France*<sup>44</sup> in which France was held to have breached several provisions of the 1996 Revised European Social Charter, including a finding of unlawful discrimination on the ground of disability, because of the insufficient provision of education for children and adults with autism.

It is crucial to the promotion of the ideals of non-discrimination and equality for persons with disabilities to note here that the Advocate General pointed out in the *BECTU* case<sup>45</sup> that the Charter served as a substantive point of reference for the interpretation of the nature and scope of a fundamental right, so that any derogation by member states should be interpreted narrowly. On his part, Professor Quinn has suggested that the value of the charter resides not only in the outcomes it could legally drive but, most importantly in the fact that it constitutes an expository of the core European social values.<sup>46</sup> It may therefore be the case that an examination of the provisions of the charter and the relevant case law of the European Committee of Social Rights would not only be instrumental in understanding the role of the anti-discrimination and equality norm in the socio-economic sphere with respect to disability but may also be influential in helping to frame how the Public sector duty on equality will be implemented by public authorities in this context.

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<sup>44</sup> Decision of the European Committee of Social Rights, Collective Complaint 13 (2003)

<sup>45</sup> C-173/99 *R v Secretary of State for Trade and Industry ex p BECTU* [2001] ECR I-4881, Opinion, para 28.

<sup>46</sup> G. Quinn, *supra* no. 42 pp279-304.

### 1.2.3 The European Convention on Human Rights (ECHR).

On October 2 2000, the Human Rights Act 1998 was brought into force in the UK. According to section 3 of the 1998 Act, British courts must interpret and give effect to existing and future legislation, so far as possible, to comply with the rights contained in the ECHR. They must also act compatibly with Convention rights when declaring the principles of the common law and equity. Furthermore, a central pillar of the Human Rights Act 1998 is section 6(1) which makes it unlawful for a public authority to act in a way which is incompatible with a convention right. One of the rights contained in the ECHR and to which the courts are expected to give effect is the right, contained in Article 14 of everyone to the enjoyment of the other Convention rights without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Though the provision of Article 14 does not expressly refer to disability, it is generally understood that disability is included by virtue of the provision of ‘...*any other status*...’ The scope of Article 14 is limited in a number of respects. First, it does not guarantee a free-standing right to equal treatment without discrimination. It is breached only where there is discrimination in the enjoyment of some other Convention right. In this respect, since there is no Convention right to employment, Article 14 gives no protection to the victim of arbitrary or unfair discrimination in the field of employment. Second, though Article 14 does not require the discrimination concerned to amount to an actual breach of another convention right, it does require it to amount to an interference with the enjoyment of such a right.<sup>47</sup> The implication here is that, a public authority which discriminates against a person with a disability under the Equality Act 2010 may not be liable under the convention because the discrimination does not amount to an interference with convention right.<sup>48</sup> Furthermore, even though the Human Rights Act 1998 requires the courts to read and give effect to legislation and to declare the common law and equity in ways compatible with the Convention right to non-discrimination, the right to equality without discrimination is not an absolute right. It has to be balanced against other fundamental rights and freedoms and broader social interests.

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<sup>47</sup> L. Clements and J. Read, ‘The Dog That Didn’t Bark: The Issue of Access to Rights under the European Convention on Human Rights by Disabled People’ in A. Lawson and C. Gooding (eds), *Disability Rights in Europe* (Hart Publishing 2005) pp21-33.

<sup>48</sup> See generally A. Lawson, ‘The Human Rights Act 1998 and Disabled People: A Right to be Human?’ in C. Harvey(ed), *Human Rights in the Community, Rights as Agents for Change* (Hart Publishing 2005)pp135-154

In view of the limitations to equality and non discrimination imposed by Article 14, the Council of Europe has adopted Protocol 12 to the Convention as a free-standing guarantee of non discrimination.<sup>49</sup> Protocol 12 provides that the enjoyment of any right set forth by law shall be secured without discrimination on any ground, and that no one shall be discriminated against by any public authority on any ground.<sup>50</sup> The refusal of the UK government to ratify the Protocol 12 will certainly undermine the efforts to promote equality for persons with disabilities through non- discrimination.<sup>51</sup> The limitations of Article 14 aside, the ECHR provides new terrain for the articulation of the rights based approach to disability. In particular, the duty to make reasonable adjustment to accommodate the needs of persons with disabilities by public authorities is gradually emerging in the jurisprudence of the European court of Human Rights (ECtHR). The notion of private life contained in article 8 of the ECHR which protects the right to respect for one's private and family life, home and correspondence has been extended beyond the protection of information, and beyond the sphere of intimate relationships, to include a right to 'establish and develop relationships with other human beings and the outside world. In fact, the ECtHR stated in *Botta v Italy*<sup>52</sup> that the notion of private life embraces the physical and psychological integrity of an individual and the 'development, without outside interference, of the personality of each individual in his relations with other human beings.

In this case, Mr. Botta who is a wheelchair user claimed that, in failing adequately to enforce laws requiring private beaches to provide physical access for persons with disabilities, the State had not complied with its obligation to respect his private life and to allow him to develop his personality. The physical barriers to accessing the beaches in question rendered him unable to enjoy a 'normal social life' and 'to participate in the life of the community. The ECtHR held that such an obligation, however, would arise only where there was a 'direct and immediate link between the measures sought by an applicant and the latter's private and/or family life. Though There was no such direct and immediate link found in the present case because the right claimed by the applicant concerning 'interpersonal relations was of such broad and indeterminate scope that there could be no

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<sup>49</sup> 04 November 2000, the Protocol requires ratification by 10 member states to effect. See generally K. Monaghan, *Blackstone's Guide to Disability Legislation* (OUP 2005) p.59.

<sup>50</sup> Article 1 of the Protocol.

<sup>51</sup> See generally, K. Monaghan, *Equality Law* (Oxford, OUP 2007) pp104-105.

<sup>52</sup> *Botta v Italy* (App no. 21439/93) (1998) 26 EHRR 241.



such conceivable direct link', the ECtHR accepted that compliance with Article 8 would sometimes require a state to adopt 'measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'.

The judicial reasoning in the Botta case was applied in *Zehnalova and Zehnal v Czech Republic*,<sup>53</sup> where a resident who was disabled brought an action against the state for its failure to enforce laws requiring certain public buildings and facilities such as the post office, swimming pool and police station to be made accessible. The ECtHR found that the failure of the state to take positive steps to make the buildings accessible could not constitute an Article 8 violation as there was insufficient evidence as to their everyday use by the applicant to establish the necessary direct and immediate link. The decisions in the Botta and *Zehnalova* cases could be contrasted to the decisions in *Marzari v Italy*<sup>54</sup> and *Sentges v The Netherlands*<sup>55</sup> where the ECtHR accepted the presence of a direct and immediate link sufficient to raise the possibility that the State would be required to take positive steps to protect the Applicants' private life. In *Marzari v Italy*, Mr. Marzari brought a claim against the Italian authorities' for their failure to provide him with housing suitable for somebody with his particular form of physical impairment. In *Sentges v The Netherlands*, Mr. Sentges challenged the Dutch authorities' refusal to supply him with a robotic arm, which would have significantly reduced his otherwise total dependence on assistance from carers and thereby given him some degree of privacy and independence.

The decisions in the two set of cases could be distinguished on the grounds that, whereas in Botta and *Zehnalova* the measures sought by the relevant applicants related to general access to public facilities, the measures sought in *Marzari* and *Sentges* were highly specific and personal in nature. However, it may be the case that in finding that the necessary direct and immediate link was established in *Marzari* and *Sentges*, the court may have been influenced by the fact that the effect of the measures sought would extend to all aspects of the lives of the applicants and be felt on a relatively permanent basis rather than only occasionally when the applicants visit the public facilities as was the case in Botta

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<sup>53</sup> App no. 3862/97 (14 May 2002).

<sup>54</sup> App no. 36448/97 (1999) 28 EHRR CD 175.

<sup>55</sup> App no. 27677/02 (8 July 2003).

and Zehnalova. In his analysis of the Article 8 jurisprudence in the context of the duty to make reasonable accommodation, Professor Olivier De Schutter suggests that the ECtHR's introduction of the 'direct and immediate link' requirement in *Botta* did not only represent an attempt to develop Article 8 positive obligations on an objective basis but also to tame the notion of positive obligations. 'If allowed to run wild, the notion of positive obligations could lead to the imposition of a requirement on the state to undertake wide-scale restructuring of the environment wherever such restructuring could contribute, at a reasonable cost, to facilitating the self-fulfillment of persons with disabilities'.<sup>56</sup>

However, the decisions in these cases are capable of giving the impression that certain activities in the life of persons with disabilities such as travelling or going on vacation or even having the choice of which shops or chemist to visit, are less worthy of protection, because they are less essential to the fulfillment of their personality. In fact, it may be the case that it is not only this hierarchy which the equality duty challenges but most importantly, the underlying idea that it would be compatible with the ideal of equality and non-discrimination to oblige a person with a disability to restrict him or herself to his or her immediate surroundings and deny him or her the opportunity of participating as an equal member in all the activities of his or her community. In this context, it is certainly a welcomed development that the concept of indirect discrimination has now been recognized in the Article 14 jurisprudence of the ECtHR and this may impact on the protection afforded to persons with disabilities under the convention.

In *DH v Czech Republic*,<sup>57</sup> the issue concerned the placement of Roman children in segregated schools for children with 'mental handicaps' where they supposedly received a 'substantially inferior education' to that received by children in mainstream schools. It was argued that the rate of such 'placement' was disproportionately high compared to that of non-Roman children and that it amounted to a violation of the Article 14 right of these children to be 'free from discrimination in connection with their right to education

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<sup>56</sup> O. De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention of Human Rights' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005). pp 35-64.

<sup>57</sup> *DH v Czech Republic* App. No.57325/00 7 February 2006 and 13 November.

under Article 2 of Protocol 1. The Grand Chamber of the European Court of Human Rights held that Article 14 had indeed been violated. It explicitly acknowledged, for the first time, that Article 14 embraced the notion of ‘indirect discrimination’ and that the Article did not require a discriminatory intent for indirect discrimination to be established. The DH Case could be linked to that of *Thlimmenos v Greece*,<sup>58</sup> where the court held that Article 14 had been breached by the state’s unjustified failure to treat differently persons whose circumstances were materially different due to their religious affiliations.

The ECHR protects what are essentially civil and political rights. However, with the growing convergence of political and civil rights on the one hand and economic and social rights on the other, there is an increasing recognition by the ECtHR that positive obligations might have social or economic implications and the decision in *Airey*<sup>59</sup> demonstrates that the ECtHR may be willing to read into the convention provisions what essentially would amount to social and economic rights. The decision in the *Airey* case resonates positively with the provisions of the United Nation’s Convention on the Rights of Persons with a Disability (CRPD) under which the right to liberty has been reconceptualised and interpreted in such a way as to include the right to reject institutional living arrangements and to choose to live in the community.<sup>60</sup> Furthermore, the right to liberty has been interpreted as not only conferring a right to a person with a disability to maximized his personal mobility but also as imposing a positive obligation on the state to fulfil this right through the provision of assistive aids and the training in mobility skills.<sup>61</sup> Similarly, the right to freedom of expression and opinion is interpreted in such a way as to impose an obligation on States to accept and facilitate the use of sign languages, Braille and other alternative modes and formats of communication by persons with disabilities.<sup>62</sup>

### **1.3 The United Nations Instruments.**

#### **1.3.1 The United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.**

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<sup>58</sup> *Thlimmenos v Greece* App. No. 34369/97[2000] ECHR 161, (2001) 31

<sup>59</sup> *Airey v Ireland* (9 October 1979) Series A no. 32.

<sup>60</sup> UNCRPD, Article 19.

<sup>61</sup> UNCRPD, Article 20.

<sup>62</sup> UNCRPD, Article 21.

The United Nations Standard Rules on the Equalisation of opportunities for Persons with Disabilities (The Rules) was the first disability specific instrument for the protection of the rights of persons with disabilities.<sup>63</sup> Although not a legally binding instrument, ‘the Rules’ represent a strong moral and political commitment by governments to take action to attain equalisation of opportunities for persons with disabilities.<sup>64</sup> However, it is possible to argue that if the rules are applied by a large number of states with the intention of respecting them as rules in international law, they can become part of customary international law, that is, general principles recognised by civilised nations.<sup>65</sup>

The Rules serve as an instrument for policy-making and as a basis for technical and economic cooperation.<sup>66</sup> Importantly, the rules reveal a social model of disability, requiring amongst others that states promote and encourage the participation of persons with disabilities in the life of their communities through education and other public awareness programmes. The international monitoring of the implementation of the Rules is co-ordinated through the United Nations Commission for Social Development and a special Rapporteur. The importance of the monitoring structure lies partly on its ability to bring sustained pressure on governments to respect and implement the provisions of The Rules.<sup>67</sup>

### **1.3.2 The United Nations Convention on the Rights of Persons with Disabilities (CRPD).**

Arguably, the most important international instrument dealing with persons with disabilities is the United Nations International Convention on the Rights of Persons with Disabilities (CRPD). The CRPD is the first binding UN disability-specific instrument. The convention together with its accompanying Optional Protocol was adopted by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007. The convention entered into

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<sup>63</sup> Adopted by the United Nation’s General Assembly, 48<sup>th</sup> Session, Resolution 48/96, Annex, of 20 December 1993.

<sup>64</sup> D. Michailakis, ‘The Standard Rules: A Weak Instrument and a Strong Commitment.’ In J Cooper(ed) *Law, Rights and Disability*(Jessica Kingsly Publishers, 2000). See also J. Cooper, ‘Improving the Rights of People with Disabilities through International Law’ in J. Cooper (ed) *Law, Rights and Disability* (Jessica Kingsly Publishers 2000) p.71.

<sup>65</sup> J. Cooper Ibid.

<sup>66</sup> K. Monaghan, *Blackstone’s Guide to Disability Legislation* (OUP 2005) p60.

<sup>67</sup> D. Michailakis. Supra no. 64.

force on 3 May 2008 and its Optional Protocol entered into force thirty days after that.<sup>68</sup> The convention is made up of a number of Articles and a preamble consisting of 26 paragraphs. The Articles espouse the convention's aims and underlining principles. According to Article 1 of the convention, its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>69</sup>

An underlining purpose of the Convention is to articulate pre-existing rights so as to give them particular relevance to the lives of persons with disabilities<sup>70</sup> thus the standard of rights articulated for persons with disabilities must be equivalent to that applying to non-disabled people. The implication here is that it will not be possible to interpret any of the provisions of the convention so as to legitimise a lower standard of protection for the rights of persons with disabilities. This point is re-enforced by Article 4(4) of the convention which provides that the convention should not in any way derogate from stronger obligations imposed on a particular state either by national or by international laws.<sup>71</sup> It is significant that the Convention goes beyond issues of equality and discrimination to address the social and economic circumstances of persons with disabilities. The preamble of the convention acknowledges 'the profound social disadvantage' currently experienced by persons with disabilities and the fact that most of them live in conditions of poverty.<sup>72</sup>

The provisions of the Convention are strongly underpinned by principles of equality, non discrimination and human rights which are intended to inform its interpretation.<sup>73</sup> Paragraph 3(a) refers to such principles as the inherent dignity, autonomy and independence of the

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<sup>68</sup> Details of the Conventions are available at [www.un.org/esa/sodev/enable/rapporteur](http://www.un.org/esa/sodev/enable/rapporteur). See also A. Lawson, *Disability and Equality Law in Britain, The Role of Reasonable Adjustment*. (Hart Publishing 2008)p30.

<sup>69</sup> According to Sheikha Hissa Al-Thani, the UN Special Rapporteur on Disability, the Convention encapsulates the principles of dignity, justice, inalienability, universality, indivisibility and the indivisibility of human rights; see [www.un.org/esa/sodev/enable/rapporteur](http://www.un.org/esa/sodev/enable/rapporteur).

<sup>70</sup> See final report of the UN Ad Hoc Committee on the Convention available at [www.un.org/esa/sodev/enable/rapporteur](http://www.un.org/esa/sodev/enable/rapporteur). For difficulties of consolidating pre-existing rights on disability, see generally P. Wright, 'When to Hold 'Em and When to Fold'Em: Lessons Learned from Enacting the Americans with Disabilities Act' in M. Breslin and S. Yee (eds), *Disability Rights Law and Policy: International and National Perspectives* (Ardsley NY, Transnational Publishers inc, 2002) pp 393-411.

<sup>71</sup> A. Lawson, *supra* no.68.

<sup>72</sup> Part one of the Single Equality Bill proposed the imposition of a duty on certain public authorities to have due regard to socio-economic considerations in deciding their strategic priorities. This provision has now been dropped from the Equality Act 2010.

<sup>73</sup> Article 3 CRPD.

individual, while paragraph 3(d) emphasises the need for respect for difference and human diversity. Other important principles and values espoused by the convention include accessibility,<sup>74</sup> full and effective participation and inclusion in society,<sup>75</sup> equality of opportunity<sup>76</sup> and non-discrimination.<sup>77</sup> The convention makes explicit reference to gender equality and of promoting the capacities of disabled children.<sup>78</sup> Given the close proximity between disability and age, it is surprising that the convention does not make any explicit reference to age.<sup>79</sup>

Article 4 sets out the ‘general obligations’ of the states under the convention, listing the mainstreaming of disability perspective into all policies and programmes as one of the strategies which must be adopted in pursuance of the general obligation to ensure the full realisation of all human rights by persons with disabilities. This is of particular significance to the Public sector equality duty which is strongly rooted on the principle of mainstreaming. Furthermore, the duty to make reasonable adjustment for persons with disabilities has been firmly grounded as a human rights value by the UNCRPD. Article 2 of the convention defines ‘reasonable accommodation’ as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

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<sup>74</sup> Article 3 (f).

<sup>75</sup> Article 3 (c).

<sup>76</sup> Article 3 (e).

<sup>77</sup> Article 3 (b). Article 5(2) prohibits disability related discrimination which is defined in Article 2 as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation’.

<sup>78</sup> Articles 3(g) and (h).

<sup>79</sup> For a detailed appraisal of the relationship between disability and age in the context of anti-discrimination, see generally M. Sargeant, ‘Disability and Age - Multiple Potential for Discrimination (2005) *International Journal of the Sociology of Law* Vol 33 pp 17-33. See also M. Sargeant, ‘Older Workers and the need for Reasonable Accommodation’ (2008) *International Journal of the Law of Discrimination* 9(3): pp163-180’. For an analysis of the demographic effect of age in the EU, see I Doron, ‘Demographic, Social Change and Equality’ in H Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*.

The concept of reasonable accommodation is also referred to explicitly in the substantive Articles of the convention dealing with education,<sup>80</sup> employment,<sup>81</sup> liberty and security of person.<sup>82</sup> What is significant here is the fact that the convention expressly requires states to impose positive obligations on both public authorities and private bodies to identify barriers in the way of the enjoyment by persons with disabilities of their human rights and to take appropriate steps to remove them. Article 2, like Schedule 2 of the Equality Act 2010 refers to persons with disabilities in the plural. The implication here is that, an expansive interpretation of the convention's definition of 'reasonable accommodation' may give rise to anticipatory duties on states similar to that under the Equality Act 2010.<sup>83</sup>

## **2. Methodology and Data Collection**

### **2.1 The Case Study Design**

This study applied the case study methodology. According to Creswell, case study research is a qualitative approach in which the investigator explores a bounded system (a *case*) or multiple bounded systems (cases) over time, through detailed, in-depth data collection involving *multiple sources of information* and reports a case *description through* case-based themes.<sup>84</sup> Three criteria informed the choice of the case study research methodology. First, this study sought to understand law in its emergence and operations and was therefore inclined to adopt the case study approach which emphasizes the crucial role of pattern and context in achieving knowledge. Though the Public Sector Equality Duty is a national legislation that applies to almost all public bodies in Britain, its implementation could be readily understood from a specific institutional context, in this instance the London Borough of Southwark. Furthermore, the bureaucratic implementation of laws involves local decision-making and governance, both of which could be very contentious as they require the exercise of discretionary powers. The implementation of the duty is particularly vulnerable not only to changes in key personnel but also to changes in political control within the local authority. In other words, the operational boundaries and

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<sup>80</sup> CRPD Article 24(2) (c) and Article 24(5).

<sup>81</sup> CRPD Article 27(1) (i).

<sup>82</sup> CRPD Article 14(2).

<sup>83</sup> A. Lawson, *supra* no.68. pp 30-31.

<sup>84</sup> J Creswell, *Qualitative Inquiry & Research Design: choosing among five approaches* (London, Sage Publications 2007). See also, RK Yin, *Case Study Research: design and methods* (London, Sage Publications 2009).

limits of the equality duty may be set by the political and organisational context of the local authority. The dynamism of the voluntary and community organizations, the partnership arrangements of the authority and its organisational culture in general are all key elements of this crucial local political and organisational context. Quite simply, it is the context that dominates and shapes the nature of local implementation of the equality duty.

Second, it was important that the method should be able to answer the research questions which the study sought to answer. The case study research sets out to answer the 'how' and 'why' questions which deal with operational links and are predominantly posed in this study. The positive duty to promote equality is a new innovation to the conventional anti-discrimination laws and there is a lack of evidence on their implementation by public bodies, especially local authorities. Therefore case study approach emerges as the most relevant research approach that permits the type of understanding of a contemporary as opposed to historical phenomena suggested in the focus of this study. This is also supported by Creswell<sup>85</sup> who argues that where knowledge is shallow, fragmented, incomplete or non-existent case study is the best approach.

Third, it was important to ensure that the Research methods fit not only the actual characteristics of the social process being studied but also the fluidity of the phenomenon of discrimination which provide its theoretical framework. The implementation of the equality duty requires a joint-up, cut-crossing approach to dealing with inequality which cross organizational or institutional boundaries. Furthermore, the legislation on the positive duty to promote equality adopts a reflexive approach, encouraging the participation of persons with disabilities and other stakeholders in the decision making process of the organization. This would suggest that the relationship between the local authorities' decision-making and its processes for implementing the duty are fundamentally interactive due to the legal framework in which they operate. It was therefore necessary not only to gain detailed knowledge of the policies, practices, process and systems of the London Borough of Southwark and the diverse views of the key actors involved with the formulation and implementation of the Council's equality and diversity agenda but also to analyse the views of the other social actors outside the organization such as organizations representing persons with a disability.

With regard to the issue of 'representativeness' or 'replication strategies' as an essential dimension of case study analysis, it is frequently asserted that case study research is limited in terms of the claims that it can make on 'knowledge'. Critics note that, in focusing on single situations or institutions chosen purposively rather than by random sampling, this particularistic approach may not produce comparable results or engage with relevant

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<sup>85</sup> J Creswell, *ibid.*



generalities. However, certain approaches can be employed to militate against the case study becoming merely episodic. One adopted here has been to focus on the theoretical implications of the work whereby the case investigated is not framed as representative in the sense that the results can be generalised to other local authorities or public bodies, but to the extent that the case is a 'theoretical exemplary of the key conceptual and legal concerns addressed in the study.'<sup>86</sup> Silverman<sup>87</sup> contends that a case is intrinsic not only because of its particularity and ordinariness but because the researcher does not intend to build theories out of generalization. This study is not intended to deliver conclusive change. Rather, its aim is to broaden understanding of the equality duty by exploring, describing and explaining the conceptual legal issues arising from its implementation which could serve decision-makers as a potential blueprint for change.

## **2.2 The Case: London Borough of Southwark**

The London Borough Southwark (Southwark Council) is a local authority in England to which the Public Sector Equality Duty applies by virtue of Schedule 19 of the Equality Act 2010. The borough borders the city of London and the London borough of tower hamlets to the north (the river Thames forming the boundary), the London Borough of Lambeth to the west and the London Borough of Lewisham to the east. To the south are the London Borough of Bromley and the London Borough of Croydon. The Council employs approximately 7,600 staff, 4 Percent of which are persons with a disability and most of who work in the Tooley Street Building which is the Council's main office. (Appendix 1, Southwark Council Staff Monitoring Report 2010).

The Council's governance structure comprises of elected councillors and a Chief Executive. The elected councillors are organised in to a cabinet comprising a leader and nine other members. Their work is split in to portfolios, reflecting broadly the administrative set-up of the Council. This arrangement ensures a close working relationship and on-going dialogue between the cabinet and the directorates management to ensure a shared understanding and a responsive decision making process. Executive decision can be taken by a cabinet member but key decisions affecting the Council's overall policies must be taken by the full cabinet and sanctioned by the full council. The Council is also subject to a further level of scrutiny by Scrutiny Committees which may consider whether a decision is appropriate and recommend

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<sup>86</sup> RK Yin Supra no. 84.

<sup>87</sup> D Silverman, *Doing Qualitative Research: A Practical Handbook* 2<sup>nd</sup> edition (London, Sage Publications 2005) p127.

that it be reconsidered. The administrative set-up of the Council consists of directorates and departments. The Council currently has eight directorates, each of which enjoys considerable freedom in managing its services. The directorates are made up of departments headed by departmental managers.

The choice of the London Borough of Southwark as the Case in this study was informed largely by the particular changes that had taken place within the Council in the equality context. Following a series of criticisms of the Council by the Local Government Ombudsman, the District Auditor, and the Council's Overview and Scrutiny Committee,<sup>88</sup> Southwark council decided in 2004 to commission an independent review of its Equality and Diversity Framework. The review was aimed, amongst others to provide suggestions or recommendations which would assist the council in combating unlawful discrimination in its employment policies and service delivery. The review was headed by Lord Ouseley and made important recommendations which if implemented, would provide a framework and momentum for the council's delivery on equality and non-discrimination. In other words, though the report was basically a policy document, it however provided a rich backdrop of ideas on the council's management of equality and confirmed the fact that the council had the necessary political will to drive through the changes that are required by the statutory duty to promote equality.

## **2.3 Ethical Considerations**

Discussions on qualitative research design must address the importance of ethical considerations.<sup>89</sup> The researcher has an obligation to respect the rights, needs, values, and desires of the informant(s). To an extent, qualitative research is always intrusive. Participant observation invades the life of the informants<sup>90</sup> and sensitive information is frequently revealed. This was of particular concern in this study where the informants' positions and institution are highly visible. However, the following safeguards were employed to protect the informants' rights and to ensure that the research is conducted in an ethical manner: A research Ethics form was completed and filed with the University's Research Ethics Committee and a letter requesting permission to proceed with the research was obtained from the research office and submitted to the head of the Equality and Diversity unit of the London Borough of Southwark.

At the start of the field work, the researcher submitted a written application to the head of the equality and diversity unit of the London Borough of Southwark and received by phone from the manager Permission to proceed with the study as articulated. In addition, special

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<sup>88</sup> Southwark council, 'An Independent Review on the Equality and Diversity Framework of Southwark council' (Lord H Ouseley Report) 2005, pg3 available at [www.southwark.gov.uk](http://www.southwark.gov.uk)

<sup>89</sup> W.L. Neuman and L.W. Kreuger, *Social Work Research Methods: Qualitative and Quantitative Applications* (Pearson Educational, Boston 2003) p.497.

<sup>90</sup> D. Silverman, *supra* no 87.

permission was obtained from coordinator of the council's Equality and Diversity Panel to attend and observe the meetings of the panel. Also, at the start of each interview session, the research objectives were articulated verbally and in writing so that they were clearly understood by the relevant informants, including a description of how the data will be used. The final decision regarding informants' anonymity rested with the informants themselves. The informants' wishes to remain anonymous were adhered to when choices were made regarding reporting the data.

### **3. Hypothesis, Research Questions and Data Collection.**

Local Authorities are important actors in the fight against discrimination and the promotion of equality in the communities. However, there is no agreement as to whether persons with disabilities would benefit from their implementation of the equality duty partly because of the slippery and problematic nature of the concept of equality of opportunity. Fredman and Spencer submit that the concept of 'Equality of Opportunity' is not only elusive and lacks a clear practical and systematic application but also is too vague and too limited to function as a workable target. Furthermore, the requirement to pay 'due regard' merely requires a body to consider the need to promote equality, not to take any action. The need to understand the legal and policy ramifications and practical complexities inherent in the processes and activities of implementing the equality duty so as to attain equality of opportunity for persons with disabilities becomes a research concern. This is more apparent as the concept of equality of opportunity may have different definitions and significance for different local authorities.

#### **3.1 Hypothesis and Research Questions**

The study's main hypothesis is that the introduction of a public sector duty on equality represents a major new innovation in anti-discrimination legislation and, if implemented properly would amount to substantive equality for persons with disabilities. The phrase 'substantive equality' is used here to refer to the basic precepts embodied in Dworkin's<sup>91</sup> distinction between equal treatment and treatment as equals, namely:

- that substantive equality goes beyond the limits of equal treatment to engage with countering disadvantage and the facilitation of equality of opportunity;
- that equality policies and strategies must not only acknowledge difference, resulting from factors such as disability, but also that different treatment is required where identical

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<sup>91</sup> R. Dworkin, *A Matter of Principle* (Oxford, OUP, 1986).

treatment would cause disadvantage;

- that citizens are entitled to equal concern and respect from the State;
- and that concrete, imaginative and systematic innovation is necessary to attain substantive equality for person with disabilities.

The main question addressed in this thesis is: To what extent is the legislative intention, in the context of disability to promote the ideals of non-discrimination and substantive equality encapsulated in the equality duty being met by the internal changes in policies and practice by the London Borough of Southwark? The specific questions addressed throughout this thesis are the following:

1. What does Southwark Council understand as the duty to promote equality in general and the concept of equality of opportunity for persons with disabilities in particular ?
2. To what extent has the London Borough of Southwark been able to embed the ideals of equality and non-discrimination into its corporate policies and strategies on employment and service delivery in order to promote equality of opportunity for persons with disabilities? In other words, how can we interpret and put into practice the employment and service delivery policies and strategies of the council in the context of the promotion of substantive equality for persons with disabilities?
3. How are the working principles of the concepts of Mainstreaming and Partnership applied and supported by Southwark Council within the framework of the participation of persons with disabilities in order to achieve substantive equality for this group of persons. In other words, to what extent will the participation of persons with disabilities in the development and implementation of policies help to mitigate their concerns about the failure of public bodies to meet their needs?
4. What is the role of Needs assessments and resource rationalisation in the promotion of substantive equality for persons with disabilities and how has Southwark council operationalised the ideals of non-discrimination and equality in order to ensure that the

rights of persons with disabilities are not undermined by the exercise of discretionary powers by the staff of the council?

5. Is mainstreaming an appropriate concept to be applied by Public authorities in addressing the concerns of persons with disabilities on the basis of two important anti-discrimination principles, notably Equal Treatment and autonomy? Would these principles ensure that mainstreaming through the conduct of impact assessments is operationalised on the basis of the heterogeneity of persons with disabilities?
6. In light of the fluidity of the concepts of discrimination and equality, what effect would the regulatory measures envisaged in the public sector duty to promote equality have beyond the organisational boundaries of the London Borough of Southwark?

### **3.2 Data Collection**

Basic techniques of qualitative research were applied throughout the research process especially during data collection and analysis. Data was collected through multiple sources, including interviews, observations and document analysis. Attendance to conferences and seminars also provided a useful source of data as well as communication through emails with various individuals within and outside the London Borough of Southwark. The primary sources examined in this work are the legal sources, the legislation and case law, which are easily accessible public documents. An extensive examination of secondary materials, including government reports and publications was employed, some of which are inaccessible and unpublished. As part of the field study which began in September 2007, the writer of this study developed contacts with certain staff and other interested persons within the London Borough of Southwark who were thus able to make available for the study useful and original materials, much of which are unpublished. These include corporate Business strategies, Guidelines, memos and reports developed for internal use by staff in the implementation of the organisation's corporate plans. Some of these documents, especially the corporate strategies and guidelines were interpreted broadly and in a teleological manner. This was because these documents were drafted broadly and resembled policy declarations which the staff of the council were expected to apply on a case by case basis.

These Strategies and Guidelines left leeway for managers to implement their contents according to the demands of their individual departments. This approach also enabled the study to take into account the organizational practices of the different departments which were likely to impact on the promotion of equality for persons with disabilities. In fact, some of the managers and directors who provided documentary evidence for this study were interpreters and analysts of the documentary data in their own right, even though their perspectives may have been influenced by their interaction with the researcher who is visually impaired. However, the reliability of the data obtained from these documents was enhanced because they were complemented by interviews and some observational data.

Over 12 semi- structured interviews were conducted for this study. In particular, the respondents were categorised according to the following groups:

1. Staff of the local authority who had responsibilities for strategic planning such as strategic directors.
2. Staff of the council with operational responsibilities such as the various departmental managers
3. Persons with disabilities. This category was further analysed into staff with disabilities who were members of the Unison-Disabled Staff Group and those who were members of stakeholders' organisations such as voluntary and community organisations. In particular, interviews were conducted with trade union representatives of the UNISON-Disabled Staff Group of Southwark council and the coordinator and the representative of the disabled staff in the Tooley Street building.
4. Representatives of voluntary and community organisations who were members of the Council's Equality and Diversity Panel.

A main purpose of engaging with these diverse categories of respondents was to ensure the robustness of the data by capturing not only the perspectives of management and workers but also the perspectives of some of the principal actors on equality outside the Council. However, the range of analysis that could be undertaken with respondents outside the council was limited by time and resource constraints. In this respect, the study made the greatest use of respondents in categories 1 and 2 (staff at the strategic and operational levels) because they were more likely to possess profound knowledge of the strategic and operational orientation of the Council. This choice of respondents did not only allow the study to focus on disability discrimination within the Council's policies and practices but also made it possible to explore the changes which had been introduced by Southwark council as a

result of the introduction of the statutory duty to promote equality that directly addressed disability discrimination and equality.

In practice, staff above the positions of managers were mostly interviewed formally using the pre-designed and tailor-made questionnaires. A tape recorder was used during most formal individual interviews when the interviewee agreed beforehand. However, informal meetings and discussions with some of the senior officials of the council also proved very useful in gathering valuable information. During such informal discussions, generally conducted outside the offices of the Council, one could realise that some officials who were unable to talk during group meetings, expressed their views in a confidential manner. These views were recorded and were valuable especially during analytical process.

As part of the field work for this study a long-term working relationship was established with key actors outside the Council. Some of these actors were from structures that had consultative status within the council such as the Southwark Disability Forum and the Southwark Pensioner's forum while the others were mainly equality organizations from the voluntary and community sectors whose operational principles and conversations were analysed and interpreted as an integral part of the empirical data obtained for this study. The data obtained from the interviews conducted with these actors were crucial in defining and exploring the operational boundaries and limits of the equality duty. This boundary may be set by the political and organisational context of the local authority. The dynamism of the voluntary and community organizations, the partnership arrangements of the authority and its organisational culture in general are all key elements of this crucial local political and organisational context.

The interview method was employed in conjunction with participant observation and documentary analysis as part of the technique of triangulation in order to ensure internal validity of the data obtained. The researcher attended ten sessions of the meetings of the Southwark Equality and Diversity Panel (EDP) between November 2008-November 2009 to observe the conduct of equality impact assessments by the panel. The meetings of the Panel are held monthly and at the end of the panel's meeting in November 2009, the panelist took

part in a round-table conference arranged by the researcher with the permission of the Panel's Co-coordinator and senior Social policy Officer of Southwark council. The conference allowed members of the Panel to brainstorm on how the council's policies and practices were impacting on the elimination of discrimination and the promotion of equality for their different groups in the community.

The conference also enabled the researcher to capture and understand the perceptions of the panelists of their role and the challenges they encounter in discharging it. Also, the researcher attended two sessions of the Unison-Disabled Staff Group of Southwark council in October 2008 and February 2009. The researcher gave a presentation to the group during the October meeting and was given the opportunity to ask questions to and received answers from the members present. Data was also collected from attending the meetings of the Southwark Disability Forum (SDF) and the Service Users' conference of the Organisation of Blind African and Caribbeans (OBAC) during which semi structured interviews were conducted with some of the officials. In particular, interviews were conducted with the Directors of OBAC and the Southwark Disablement and the Secretary of the Southwark Disabled Forum.

Participant observations usually refer to more than just the process of observing while participating. It involves the researcher using all the senses, noticing what is seen, heard smelled, tasted or touched.<sup>92</sup> As a visually impaired person, the researcher was not only assisted in this data collection phase by an able assistant but naturally relied on the heightened use of his other senses of touch, smell, hearing and feeling. This was important in relating to the experiences of discrimination and prejudice of the other participants with a disability. Where appropriate, the comments of the assistant were compared to the field notes and the experiences of the researcher. Finally, it is important to point out here that this study was not just about observing the institutional workings of the London Borough of Southwark and analysing the results at a distance at some later date. It involved observing, participating, talking, checking, and understanding and making interpretations over an extended timeframe,

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<sup>92</sup> W.L. Neuman and L.W. Kreuger, Supra 89.



all of which was required if the study was to capture, understand and share the council's experience with regard to disability discrimination.

As a qualitative research, data analysis was integral to the research process. "Successive approximation" involves repeated data analysis as data is being collected and adjusting the research orientations to the realities being revealed in the research process. The underlying purpose of the case design was to provide a basis for theoretical replication. The extensive use of multiple data collection techniques ensured internal validation via triangulated results. This case study has supported Yin's<sup>93</sup> suggestion that triangulation has the potential to increase the robustness of research by mutual validation and by complementing knowledge generated by dissimilar data collection techniques. Regarding validation, data generated by the different techniques during the study were as important as conflicting facts that help to identify biases and complexities. Similarly, with respect to the complementarity of the various data, one way of matching them to produce a more complete picture of the institutional reality of equality management in the London Borough of Southwark was to use one type of data to fill gaps in the other source. Triangulation was also employed to add causal explanation to the associations of various factors. Here, interviewing and observations methods had different strengths. Participant observation allows easier access to the practical aspects of policy development and implementation while interviews added causal explanations of the identified practices. In addition, data from interviews were more appropriate to explore more complex issues such as institutional norms. The study therefore demonstrates how triangulation can address legal issues of institutional discrimination at the levels of ontology, theory and ultimately, methodology.

#### **4. Organisation of the Thesis**

The study has been divided into eight chapters. Chapter two explores the relationship between the Public Sector Equality Duty and the ideals of equality and anti-discrimination within the context of disability and argues that the added value of the duty to a statutory framework that

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<sup>93</sup> R.K.Yin, *Case Study Research*: Supra no 84.

already contain anti-discrimination guarantees is that it extends principles of substantive equality to those areas of an organisation's functions where discrimination law would not ordinarily apply. The duty does not only reflect a recognition that discrimination in society extends far beyond individual acts of prejudice and discrimination but also potentially bridges the gap between the two traditional approaches to tackling inequality: the legal strategy, via anti-discrimination legislation, and the social welfare strategy. The duty uses the force of legislation to uphold social rights by encouraging policy initiatives which have the potential to further the aims of substantive equality.<sup>94</sup>

Chapter three takes a critical overview of the statutory prohibition of disability discrimination. There are intriguing questions regarding possible causal links between the provisions of the Equality Act 2010 and the preceding Disability Discrimination Act 1995. In this respect, the two statutes have been juxtaposed in order to capture their relative impact on the promotion of the rights of persons with disabilities. Chapter four undertakes a thematic analysis of the Equality Schemes of the London Borough of Southwark in the light of the participation of persons with disabilities and establishes that the Schemes are not just legal documents intended to assist the Council in delivering on its general duty but represent a window onto the values of the local authority. These values provide a clear framework for understanding the relationship between the Council's policies and practices on need assessments and resource rationalisation and the ideals of non-discrimination and equality in the promotion of substantive equality for persons with disabilities.

Chapter five examines the detailed process of disability mainstreaming and impact assessment by the London Borough of Southwark and the extent to which the concept of partnership could help reinforce the process and thus make a difference for persons with disabilities. It is established that the requirement for public authorities to mainstream equality gives rise to new theoretical and practical challenges in that they are not only required to address an increasingly complex range of 'protected characteristics' under the Equality Act 2010 but are also required to engage with 'equality and diversity'. Theorizing disability

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<sup>94</sup> S. Fredman, *supra* no.8 pp219-248. See also G. Quinn, *supra* no.38 pp231-277.

mainstreaming in the context of diversity represents a significant challenge, as it does not only make the participation of persons with disabilities particularly central to the whole process but most significantly, transforms mainstreaming from a technocratic tool to an institutional manifestation of participatory democracy.

This study proceeds to chapter six where the focus shifts to the employment of persons with disabilities by the London Borough of Southwark. In this respect, the chapter has been premised within three broad thematic frameworks which appear to underpin the operationalisation of the equality duty by Southwark Council. First, at the borough wide level there is a growing policy orientation towards a ‘from welfare to work’ approach to the participation of persons with disabilities in the labour market. Second, there is a heightened awareness amongst the council’s employees with disabilities not only of their right not to be discriminated against but most importantly, to be treated as equals and with dignity. There is a correspondingly growing pressure on the Council’s management to look beyond the frontiers of ‘negative compliance’ and ‘reasonable adjustment’ and to adopt a participatory and inclusive approach based on the social model of disability rather than the traditional individualistic model. Third, there is an increasing trend within Southwark Council towards an outcome focused approach to disability equality. This is reflected in the development by the Council of performance and capability management frameworks which recognize the point that it is the interaction of disability with social processes and the absence of sensitivity in such processes to disability that constitutes a barrier to persons with disabilities entering and staying in employment.

Chapter seven explores the connections between the ideals of equality and non-discrimination and service delivery in the context of disability in order to understand the extent to which Southwark council has been able to embed the ideals into its corporate policies and strategies on service delivery in order to promote substantive equality for persons with disabilities. It is demonstrated that a crucial factor that links the two together is the current strong focus within the Council on systemic change and that this convergence is not only encompassed in the positive duty on equality but that it is aimed at delivering tangible outcomes for individuals. Chapter eight reports on the thematic expositions of the previous chapters,

drawing in its course conclusions which could provide the spring board for further research.

## Chapter Two: The Public Sector Equality Duty: Aspirational Legalism or Substantive Equality?

### Introduction.

The inclusion in British anti-discrimination statute of positive duties to promote equality, referred to by Fredman<sup>95</sup> as ‘fourth generation equality laws’ and by Mabbett<sup>96</sup> as ‘aspirational legalism’ has attracted considerable attention from both policymakers and the academic world, both in respect of their contents and the process of implementation.<sup>97</sup> This is partly due to the fact that the duty constitutes ‘one of the most important responses to the individualized, retrospective and passive enforcement and remedial structure or model of anti-discrimination law’.<sup>98</sup> This chapter explores the relationship between the Public Sector Equality Duty and the ideals of equality and anti-discrimination within the context of disability and argues that the added value of the duty to a statutory framework that already contain anti-discrimination guarantees is that it extends principles of substantive equality to those areas of life where discrimination law would not ordinarily apply. The duty does not only reflect a recognition that discrimination in society extends far beyond individual acts of prejudice and discrimination but also potentially bridges the gap between the two traditional approaches to tackling inequality: the legal strategy, via anti-discrimination legislation, and the social welfare strategy. The duty uses the force of legislation to uphold social rights by encouraging policy initiatives which have the potential to further the aims of substantive equality.<sup>99</sup> It carries with it a positive obligation on organizations to promote equality in addition to the negative obligation to refrain from discriminating.<sup>100</sup>

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<sup>95</sup> S. Fredman, ‘*Discrimination Law*’ supra no.2 p. 176. See also B. Hepple, M. Coussey and T. Choudhury, *Equality: A New Framework* (Oxford, Hart Publishing, 2000). P 212.

<sup>96</sup> D. Mabbett, ‘Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy.’ Vol. 79 *The Political Quarterly* (no.1) 2008. Mabbett refers to aspirational legalism in the context of the duty’s emphasis on procedural requirements especially in terms of target setting. In recent years the government has attempted to encourage the use of positive action in the public sector by adopting a ‘goals and timetables’ approach; see generally *Modernising Government*, Cm 4310 (London Stationary Office 1999) paras 6.23-6.28

<sup>97</sup> See generally C. O’cinneide, ‘A New Generation of Equality Legislation?’ Supra no. 2 Pp 219-248. Also S. Fredman, ‘Equality: A New Generation?’ (2001) Vol.30 No.2 *ILJ* Pp.145-168; S. Fredman and S. Spencer, ‘Equality: Towards and Outcome Focused Positive Duty’ September (2006) 156 *Equal Opportunities Review* pp. 14

<sup>98</sup> S. Fredman, supra no.2 pp176.

<sup>99</sup> S. Fredman, ‘Disability: A Challenge to the Existing Anti-Discrimination Paradigm?’ supra no.8 pp 219-248. See also G. Quinn, ‘Disability Discrimination Law in the European Union’ supra no38 pp231-277.

<sup>100</sup> K Monaghan, ‘Equality Law’ supra no51 P625-650.

## 1 The Framing of the Duty.

### 1.1 The requirement of 'Due Regard'.

At the heart of the general duty to promote equality is the core requirement that a public authority must pay 'due regard' to the need to eliminate unlawful discrimination and promote equality of opportunity.<sup>101</sup> There has been some uncertainty whether the 'due regard' requirement is a mere procedural requirement or a substantive, action-based stipulation requiring a public authority to take positive actions to promote equality.<sup>102</sup> This point was influential on both the Equalities Review<sup>103</sup> and the Discrimination Law Review<sup>104</sup> both of whom were concerned that the implementation of the duty may become a mere bureaucratic process of compliance rather than one focussed on achieving tangible outcomes.<sup>105</sup> The requirement of 'due regard' does not only embody the principles and policy goals underlying the legislation but is also capable of providing guidelines for compliance. A core policy goal contained in the obligation to pay due regard is that of equality mainstreaming. It is extremely likely that, Without such an obligation, public authorities would be able not only to ignore the equality-related impact of various aspects of their operations but most importantly, equality considerations would no longer have to be mainstreamed into their general operations. Mainstreaming of equality is a proactive concept and if a public authority's assessment of the impact of a policy shows a possible 'adverse impact' on persons with disabilities, it must consider how this impact might be

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<sup>101</sup> Equality Act 2010 s149 (1). Also, S49 (1) Disability Discrimination Act 2005 Amendment.

<sup>102</sup> S Fredman & S Spenser' Equality: Towards and Outcome Focused Positive Duty' September (2006) 156 *Equal Opportunity Review (EOR)* pp. 14 – 19; Also, S Fredman & S Spenser' Equality: Towards and Outcome Focused Positive Duty' Submission to the Cabinet Office Equalities Review and to the Discrimination Law Review (June 2006) available at <http://www.edf.org.uk/news/deliveringequalities/submission/20030606-final.pdf> (last accessed 10 July 2008).

<sup>103</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (Communities and Local Government Publications, 1 June 2007, Product Code 06DL0440/a, [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk)).

<sup>104</sup> Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain - A consultation paper  
<http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation>

<sup>105</sup> A Research commissioned by the defunct Commission for Racial Equality (CRE) had established how easily the positive duty to promote race equality under the Race Relations Act 1976 Section 71 could become an exercise in procedure rather than real and tangible outcomes; see generally S. Ross/CRE, *Towards Racial Equality* (London, CRE 2003), executive summary available at [www.cre.gov.uk](http://www.cre.gov.uk) (first accessed 28 September 2007).

reduced.<sup>106</sup> The requirement of ‘due regard’ provide a framework for public authorities to reflect on how social support might be better directed to achieve the twin objectives of non-discrimination and social welfare for persons with disabilities.

### **1.1.1 The Concept of Relevance and Proportionality.**

Another core principle engaged by the requirement of ‘Due regard’ is that of proportionality.<sup>107</sup> The test of proportionality has been applied not only in discrimination law<sup>108</sup> but also in the field of human rights and affords a higher standard than the test of reasonableness which had been applied in administrative law.<sup>109</sup> The duty to promote equality does not immunise from anxious scrutiny under the prohibition against discrimination all forms of positive action that may be taken by a public authority in discharge of its duty under the legislation. The measures that are required to fulfil the equality duty are permissible in so far as they do not violate the right of persons with disabilities to non-discrimination.<sup>110</sup> In the disability context, the principle of proportionality helps make the connections between such measures and those that may be perceived as violating the rights of persons with disabilities.

The duty is not absolute but proportional. The duty does not necessarily trump other competing considerations that the authority should take into account when carrying out its functions. In applying the test of proportionality, the courts are likely to adopt a contextual approach by weighing the policies of a public body against the purpose sought to be

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<sup>106</sup> Disability Rights Commission (DRC), Briefing-Discrimination Law Review: A Framework for Fairness (London, DRC 2007). The DRC together with the CRE and Equal Opportunity Commission were merged into the Commission for Equality and Human Rights in 2007.

<sup>107</sup> C. Casserley, ‘*The disability Equality Duty and the Public Sector and its Legal Context*’ (2007) available at [www.drc.gov.uk](http://www.drc.gov.uk) (accessed 5 January 2008).

<sup>108</sup> The proportionality test has been applied in the context of indirect discrimination; see Section 19 Equality Act 2010.

<sup>109</sup> For an application of the proportionality test by the European Court of Human Rights, see *Botta v Italy* [1998] 26 ENRR 241. See also *R v Secretary of State for Home Department, ex Parte Daly* [2008] UKHL 26; For the test of reasonableness applied in administrative law, see *Associated Pictures v Wednesbury Corporation* [1948] 1 KB 223, 230.

<sup>110</sup> Professor Quinn postulates that positive measures round up, and do not eliminate the prohibition against discrimination; G. Quinn, ‘Disability Discrimination Law in the European Union’ *supra* no.38. Section 149 (6) Equality Act 2010.

achieved by the discriminating policy, and the extent to which the rights of persons with disabilities may be impaired.<sup>111</sup> A key consideration in determining the extent to which a policy or practice impairs the rights of persons with disabilities is the disadvantaged position of this group of persons in the society. In this respect, it is plausible that the Courts will be more inclined to uphold policies that promote the position of disadvantaged groups, and less inclined to uphold those that entrench pre-existing disadvantage.<sup>112</sup> The flexibility inherent in the proportionality test would dictate that the test will be applied more or less intensely depending upon the position of the affected group in society. In other words, the worse-off a group is, the more intensely the standard will be applied, and the greater the weight that will be attached to its interests. Such an approach will resonate with the emphasis of substantive equality upon improving the position of worse-off groups such as persons with disabilities.<sup>113</sup>

### **1.1.2 Identifying the Equality Goals.**

Positive duties are only meaningful if they are targeted towards particular aims.<sup>114</sup> These aims need to be informed by an understanding of the principles as well as the policy goals behind the legislation. A major advancement registered by the public sector equality duty is the fact that the duty goes beyond the broad requirement to prevent discrimination and to promote equality of opportunity and encompasses other values such as participation, individual dignity, the elimination of stereotype and prejudice and the promotion of community cohesion. These goals involves an assertion of the equal moral self-worth of all human beings and a corresponding claim on the resources of society to meet basic as well as disability-specific needs. They resonate well with the substantive equality paradigm encapsulated in Section 3 Equalities Act 2006, which not only set the goals for the Commission on Equality and Human Rights (CEHR) but also the terms of entry and participation into all areas of public life on a genuinely equal footing. This state, amongst

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<sup>111</sup> *Marzari v Italy* (1999) Application No.36448/97 European Court of Human Rights(ECtHR); *Zehnalova and Zehnal v the Czech Republic*(2002) Application No.38621/97 ECtHR).

<sup>112</sup> *R (Chavda) v Harrow London Borough Council* (2007) EWHC 3064; *Kaur & Shah, R v London Borough of Ealing & Anor* [2008] EWHC 2062 (Admin) (29 July 2008) available at URL: <http://www.bailii.org/ew/cases>.

<sup>113</sup> E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing 2009) pp 151-195. M. Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution. Winter 2007.*Public law*.pp.748-769.

<sup>114</sup> S. Fredman, *supra* no.2 p. 188.



others that the Commission shall encourage and support the development of a society in which there is not only respect for the dignity and worth of each individual but one in which People's ability to achieve their potential is not limited by prejudice or discrimination and Each individual has an equal opportunity to participate in society. This is reinforced by the Equalities Review<sup>115</sup> which defines an equal society as one which not only protects and promotes substantive equality but also removes the barriers to peoples' flourishing through the recognition of difference.

## **1.2 The Positive Duty and the Concept of Equality of Opportunity.**

Equality of opportunity is a paramount concept in anti-discrimination law and a core element in the Public sector duty on equality. However, the concept could have a range of applications and its meaning is constantly shifting.<sup>116</sup> At its narrowest, it entails a conscious effort at identifying and removing barriers to inclusion. This may open the doors, for example to employment for persons with disabilities but does not mean that they have the resources to progress through the doors. A substantive understanding of equal opportunities would require not only that access barriers be progressively removed but also that resources be provided to make sure that persons with disabilities can make use of employment opportunities. Such an approach may be necessary if the duty to promote equality of opportunity is to be effective in removing the barriers to inclusion and participation for persons with disabilities.<sup>117</sup>

### **1.2.1 The Equality Difference Divide and the Notion of Equal Treatment.**

The complex relationship between the concepts of equality and difference is central to an understanding of the concept of equal opportunity in the context of disability. The central tension between the concepts of equality and difference arises from the fact that the traditional approach to equality which has dominated our anti discrimination laws has been

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<sup>115</sup> Fairness and Freedom. Supra no. 8

<sup>116</sup> The Equalities Review identified equality in terms of equality of outcome, equality of opportunity, equality of process and equality of worth; Equalities Review *ibid*. On her part, Professor Fredman identifies the different widths of equality in terms of formal equality, equality of result and equality of opportunity. S. Fredman, *supra* no.2 Pp. 1-14.

<sup>117</sup> S. Fredman and S. Spencer, 'Towards and Outcome Focused Positive Duty' *supra* no.102.

based on the notion of equal treatment or treatment as consistency.<sup>118</sup> The notion of equal treatment asserts that persons with disabilities are not relevantly different and that, like race and gender, the human difference of disability is irrelevant and its use in the allocation of benefits or rights is invidious. The paradox here is that disability discrimination is rooted in the fact that, historically, persons with disabilities have often been seen as different and inferior, incapable of performing the routine tasks of life.<sup>119</sup> Equal treatment may treat persons with disabilities as individuals and rejects treating them as inferiors but this may amount simply to ‘privileging the dominant norm.’ In this context, the Public sector duty to promote equality reinforces the anti-discrimination ideal by valorising the group and group identity of persons with disabilities by requiring public authorities to positively accommodate the difference of disability.<sup>120</sup>

The ‘minority rights’ perspective of disability is inspired by theoretical analysis of racism and depicts persons with disabilities as a discrete and insular minority who have suffered from a history of discrimination and who are not only relatively powerless politically but are also socially excluded.<sup>121</sup> Its thrust lie in the claim that persons with disabilities call, not for charity, but for rights based on the need to redress unfair prejudice and a history of discrimination and disadvantage.<sup>122</sup> Its dependency on viewing disability as a group-defining characteristic seems particularly relevant to the notion of substantive equality. The Minority Rights perspective is underpinned by the notion of ‘identity politics’. ‘Identity politics’ seeks to transform the historically stigmatized attribute of disability into a positive aspect of group identity.<sup>123</sup> It operates to define legally persons

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<sup>118</sup> S. Fredman, ‘Disability: A Challenge to the Existing Anti-Discrimination Paradigm? Supra no.8; H. Hill and R. Kenyon, *Promoting Equality and Diversity: A Practitioner’s Guide*, (Oxford, OUP 2008) p.5

<sup>119</sup> The doctrine of ‘equal but separate’ in the context of race was rejected in the US case of *Brown v. Board of Education*, 347 US 483, 495 (1953).

<sup>120</sup> For an exploration of the equality/difference divide and anti discrimination provisions on disability within the context of the EU Framework Directive, see G. Quinn, ‘Disability Discrimination Law in the European Union’ in H. Meenan, supra no. 38 pp231-277

<sup>121</sup> S. Fredman, supra No. 8 pp 219-248.

<sup>122</sup> J Bickenbach, ‘Minority Rights or Universal Participation: The Politics of Disablement’ in M Jones and A Basser Marks (Eds), *Disability, Diversity and Legal Change*. Cambridge, Kluwer Publishing 1999.101-116.

<sup>123</sup> I. Young, *Justice and the Politics of Difference*, (Princeton, Princeton University Press (1990). Also, S. Fredman, ‘Disability Equality: A Challenge to the Anti-Discrimination Paradigm....’ supra no. 8

with disabilities by way of their disability. It builds on the concept of difference, arguing that persons with disabilities are so fundamentally different as to attract judicial scrutiny on the basis that their disadvantage position in society potentially gives rise to issues of equality and discrimination.

Quinn<sup>124</sup> has pointed out the policy dilemma on disability inherent in the equality/difference divide, stating that ‘to take the difference into account means doing justice to the difference but at the possible price of perpetuating stereotypes about the nature of difference. To ignore the difference means avoiding perpetuating stereotypes but at the price of failing to do justice to the reality of the difference’. However, the equality agenda encapsulated in the conventional antidiscrimination paradigm on disability equality has moved beyond seeing discrimination as merely stigmatic or prejudiced treatment and now encompasses a more substantive notion of equality. The advancement registered by the Public sector equality duty with regard to the notion of ‘difference’ could be analysed from three main perspectives; First, the duty is premised on the explicit acknowledgement that persons with disabilities are different and that A commitment to advancing equality of opportunity for this group of persons requires a focus not on sameness or identical treatment but on difference which takes account of their disabilities.<sup>125</sup> The duty recognizes that equality of opportunity for persons with disabilities will sometimes require treatment which is different rather than treatment which is identical. The concept of equal opportunity carries with it an obligation on public authorities to ensure that, where appropriate, persons with disabilities are treated differently from persons without a disability. Treating them in the same way as the non-disabled would be to fail to recognize significant differences in their circumstances and would result in a denial rather than an advancement of equality of opportunity for this group of persons.

Second, the duty emphasizes the importance of responding to the differing needs and circumstances of persons with disabilities as a pre-condition of the effective advancement of equality of opportunity for this group of persons. The principle of

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<sup>124</sup> G. Quinn, ‘the Human Rights of People with Disabilities Under the EU Law’ supra no.11 p. 290.

<sup>125</sup> Section 149 (4) Equality Act 2010.

advancement of equality of opportunity for persons with disabilities involves taking positive measures to meet their needs which are different from the needs of persons who are not disabled.<sup>126</sup>

Third, the focus of the equality duty on difference and the taking of positive measures in the context of disability do not imply a rejection of the principle of equal treatment. The principle of equal opportunity for persons with disabilities does not amount to positive discrimination as it is not intended to create an artificial opportunity where none might otherwise exist. This point is evidenced in the fact that Section 149(6) Equality Act 2010 states that compliance with the duty is not to be taken as permitting conduct that would otherwise be prohibited by or under any of the anti-discrimination or equality clause of the Act. The concept of equality of opportunity must be balanced against the overall objective of the legislation which is to eliminate discrimination and to promote equality amongst the various groups in the community. Thus, like substantive equality, the concept of equality of opportunity lends content to the operationalisation of the notion of equal treatment by stipulating that whether a person has a disability or not is relevant to whether they may be treated differently.<sup>127</sup>

### **1.2.2 Formal and Substantive Equality.**

A distinction that is increasingly being made to justify the adoption of positive measures in the context of equality for persons with disabilities is the difference between formal and substantive equality.<sup>128</sup> Formal equality or equality as sameness is reflected where two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner.<sup>129</sup> Formal equality is embodied in the Aristotelian notion of equality that likes

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<sup>126</sup> Section 149 (3) (b) Equality Act 2010

<sup>127</sup> M. Wesson, 'Equality and Social Rights....': supra no. 106.

<sup>128</sup> A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, (Oregon, Hart Publishing 2008). P19. Also S Fredman, *Discrimination Law* supra no. 2.

<sup>129</sup> N. Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) Vol.24 Oxford Journal of Legal Studies pp 693-716.

should be treated alike and unlike treated unlike and its focus is on identical treatment or fairness as consistency. Formal equality takes the view that all individuals should be treated alike irrespective of their group membership and that, in judging the similarity or dissimilarity of two cases, group membership should never be taken into account.<sup>130</sup> Formal equality is essentially individualistic and appears to reject as conceptually incompatible with its notion of equality any form of positive action that is designed to promote substantive equality for the disadvantaged groups in the community.

The idea of substantive equality took a relatively early hold in the case law of the United States Supreme Court in the case of *Brown v Board of Education*.<sup>131</sup> Its strength lies not only on its acknowledgement that equal treatment may not be sufficient to achieve full equality in practice but most importantly in the recognition that where a group (persons with disabilities) have experienced a cycle of disadvantage across different areas of social life, then positive action may be needed to compensate for the accumulation of inequality. The focus of substantive equality is on the characteristics of group membership. It takes account of the position of the individual in society in relation to his or her group membership and the impact that any policy or measure is likely to have on her. It goes beyond the narrow confines of formal equality or identical treatment and addresses the measures which may be required in order to counter disadvantage and to facilitate equality of opportunity. It therefore requires difference, resulting from factors such as disability, to be acknowledged and to elicit different treatment where identical treatment would cause disadvantage.<sup>132</sup> A key feature of substantive equality is therefore its commitment to bettering the position of worse-off sectors of society.<sup>133</sup>

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<sup>130</sup> M. Wesson, *supra* No.9. Also, R. Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537. E. Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 *Modern Law Review* 175.

<sup>131</sup> 347 US 483, 495 (1953).

<sup>132</sup> A Lawson, *Disability Equality in Britain* *supra* no. 68 p 19

<sup>133</sup> M. Wesson, *supra* no.9. See also, H. Collins, 'Discrimination and Social Inclusion' 66 *MLR* 2003.P 16-41.

The difference between formal and substantive equality is encapsulated in Ronald Dworkin's distinction between the equal treatment of people and the treatment of people as equals.<sup>134</sup> The notion of treatment of people as equals is based on the understanding that people are entitled to equal concern and respect from the State. It marks a fundamental departure from the notion of formal equality or equal treatment by requiring treatment which is not identical in situations where treating everybody in the same way would demonstrate a lesser degree of concern and respect for certain individuals because of their particular circumstances. This point is described by Bamforth who asserts that a crucial difference between equal treatment and treatment as equals lies in the comparison which each involves. Equal treatment requires only a crude evaluation of whether two persons or actions are sufficiently 'the same' that they merit similar treatment. On the other hand, treatment as equals involves a substantive and more flexible conception of equality which focuses not on the question whether any deviation from equal treatment is permitted but on whether any such deviation is consistent with equal concern and respect.<sup>135</sup>

### **1.2.3 Equality of Opportunity and Positive Action.**

What converts the Public Sector Equality Duty from mere aspiration into a powerful lever for change is the realization that, in order to be effective, antidiscrimination policies must reach beyond legal prohibitions and incorporate positive measures. Policies developed in order to redress disadvantage, whether in the labour market or elsewhere, may be referred to as 'positive actions' where they do not only entail the preferential treatment of those disadvantaged by their group membership but also the taking of steps whose impact will be to ameliorate disadvantage associated with membership of these groups. Such policies recognise that disadvantage frequently tracks group characteristics such as disability and therefore takes these into consideration in the advancement of equality of opportunity.<sup>136</sup>

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<sup>134</sup> R. Dworkin, *A Matter of Principle* supra no.91 pp190-98 and 205-13.

<sup>135</sup> N. Bamforth, 'Conceptions of Anti-Discrimination Law' supra no.122.

<sup>136</sup> Positive actions or measures have been referred to variously as 'reverse discrimination' and 'affirmative action'. See generally A. Lawson, *Disability and Equality Law in Britain*, supra no.121 pp.187-232 supra no 68. Monaghan refers to positive measures as the 'dignity' and 'disadvantage' models of equality; See also, K. Monaghan, *Equality Law*. (Oxford, OUP 2007).pp277-283. Also, S. Fredman, *Discrimination Law* supra no.1 pp125.

The text of the Public Sector Equality Duty is alive to the need for positive action measures for persons with disabilities both in and outside the field of employment. According to s158 (1) EA 2010, Public authorities are entitled to take positive measures not only to counter disability related disadvantage and to meet the needs of this group of persons associated to their disability but also to promote their participatory rights generally. Section 159 provide for positive action with regards to recruitment and promotion in the field of employment. In particular, employers are allowed to take positive action to enable or encourage persons with disabilities to overcome or minimise any disadvantage connected to their disability which they may be suffering,<sup>137</sup> or to participate in any activity in which they are under- represented. According to s159 (3), positive action in this context involves treating persons with disabilities more favorably than persons who are not disabled.

However, the ambit of the permissible positive action in terms of more favourable treatment for persons with disabilities in recruitment and promotion is subject to certain specified conditions which may, in practice operate to curtail the ability of employers to achieve substantive equality for persons with disabilities who wish to enter in to or remain in their employment. First, the employer must not have a standard policy of treating persons with disabilities more favourably in connection with recruitment or promotion than persons who are not disabled.<sup>138</sup> Second, an employer would be able to treat a person with a disability more favorably than a non-disabled person only if the person with a disability is as qualified as the non-disabled person to be recruited or promoted.<sup>139</sup> This would ensure that recruitments and promotions in employment will continue to be based on merit and that only the most qualified person is given the job. Positive action in this context does not represent a violation of the merit principle whereby recruitments or promotion are based on merit. It also does not amount to Positive discrimination as it does not require that a person with a disability be recruited or promoted over or above a more qualified non-disabled candidate, irrespective of merit simply because he or she has a disability. Thus, the Act allows for more favourable treatment only within the context of a tie-break situation; that is, where both the

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<sup>137</sup> Section 159 (1) (a) Equality Act 2010.

<sup>138</sup> Section 159 (4) (b) Equality Act 2010

<sup>139</sup> Section 159 (4) (a) Equality Act 2010.

disabled and non-disabled candidate are regarded as equally well qualified but the fact that one of them has a disability is taken into account as a tie-breaking factor in their favour.

This provision reinforces the provisions of the Local Government and Housing Act 1989, s7 which makes it mandatory that all appointments by local authorities be made on merit. It also has a particular resonance with the provisions of Recital 17 of the Framework Directive which states that the Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.<sup>140</sup> The notion of meritocracy on which section 7 and the Framework Directive are based is an extremely narrow one as they are focused not only on the present abilities of the individual but also on measurable performance in conventional systems of education and employment which are themselves likely to be neutral in terms of culture or impairment.<sup>141</sup> Merit is a social construct which cannot be extracted from the social context and therefore cannot be objectively quantified.<sup>142</sup> In relation to job opportunities, the merit principle may operate to perpetuate discrimination and inequality by failing to take into account the fact that an individual's lack of the relevant job qualification or capability may be due to entrenched social disadvantage or physical attributes such as impairments.<sup>143</sup> Most importantly, the merit principle seems particularly unsuited in the disability context as it undermines the need for adjustments which is central to equality of opportunity for persons with disabilities.<sup>144</sup>

The extent to which positive discrimination was permitted under the DDA 1995 was related, in part to the fact that the protection afforded by the statute was asymmetrical. The legislation did not explicitly specify that a person with a disability must be qualified for a job in

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<sup>140</sup> Council Directive 2000/78/EC of 27 November 2000.

<sup>141</sup> A. Lawson, *Disability Discrimination in Britain* supra no.68 p 191-2.

<sup>142</sup> S. Fredman, supra No.8 P.219-48.

<sup>143</sup> *Ibid* p. 204

<sup>144</sup> See generally C. McCrudden, 'Merit Principles' 18 Vol. 543 1998 OJLS P.559-62.



order to be treated more favourably than a non-disabled person. In *Archibald v Fife Council*,<sup>145</sup> the House of Lords held that the DDA 1995, to the extent that the provisions of the Act required it, permitted and sometimes obliged employers to treat persons with disabilities more favourably than others. This may even require transferring them to a higher level position without the need for a competitive interview if that would remove the disadvantage the disabled person would otherwise face and, in appropriate cases, creating a new post in substitution for an existing post. However, while an organization may not maintain a policy requiring that persons with disabilities be treated more favourably, the provisions of s159 (4) (b) will operate to ensure that employers continue to develop and maintain positive measures to support and encourage persons with disabilities with regard to areas such as training opportunities and work placements.

#### **1.2.4 Positive Duties and the duty to make Reasonable Adjustment**

There is a link between the positive duty to promote disability equality and the duty to make reasonable adjustment. First, the both duties are forms of positive action or substantive equality that not only require due regard to be given to the disadvantaged position of persons with disabilities but are both concerned with the active removal of disadvantages to which persons with disabilities would otherwise be subjected to.<sup>146</sup> Second, The Positive duties to promote Disability Equality complement reasonable adjustment requirements by extending principles of substantive equality across the full range of policies and practices that an organisation implements, including areas such as procurement where the duty to make reasonable adjustment would not ordinarily apply and thus make sense in terms of theoretical approaches to substantive equality for persons with disabilities. Third, the both duties are underpinned by the social model of disability which provides an intersection between social welfare and non-discrimination law.

Given the obvious similarities between the Positive duties and the duty to make reasonable adjustment, the question that may be asked is; What is the added value of the Positive duties

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<sup>145</sup> *Archibald v Fife Council* (2004) UKHL 32, (2004) IRLR.

<sup>146</sup> C. O'Cinneide, 'A New Generation of Equality Legislation?' *supra* no.2. P.220.

to the anti-discrimination statute that already contain a duty to make reasonable adjustment for persons with disabilities? The importance and relevance of the Positive duty to disability may be found partly in the differences between the two duties which represent, conceptually, the difference between the individual, complaint-led model and the proactive or group model of discrimination laws. First, unlike the positive duty to promote equality, the duty to make reasonable adjustment does not positively provide for the participation of persons with disabilities in the formulation and review of an organisation's policies. Discharging the duty may necessitate involving the individual in an interactive dialogue with the employer to search for the appropriate kind of adjustment that may be required in the particular circumstances but this is essentially individualized, ensuring a more direct link between the adjustment to be provided and the circumstances of the person with a disability. Knowledge by an employer of the disability of the employee or applicant is crucial in this process. In the proactive model encapsulated in the positive duties, the participation of that group assumes great significance as a means by which to deepen the democratic legitimacy and reach of equality. Participation is not predicated on the knowledge by an employer of the disability of individual participants.

Second, Positive duties do not generally create subjective rights. The failure to comply with the Public sector equality duty does not amount to unlawful discrimination and its enforcement lies either in the hands of individuals or organisations willing to bring actions for judicial review, or in the hands of the Equality and Human Rights Commission. A consequence of this lack of direct accountability between positive duties and the individual with a disability is the fact that there does not tend to be a close correlation between any positive measure provided and individual needs. This accountability deficiency inherent in the positive duty is compensated for by the duty to make reasonable adjustment which is enforced as part of a discrimination claim brought by an individual claimant and is intimately tied to the non-discrimination idea. the duty creates clear legal standing for the interested disabled person to challenge the manner by which he or she is being accommodated and to ensure that any measures taken are adjusted to his or her realities.<sup>147</sup>

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<sup>147</sup> For an analysis of the relationship between positive measures and the duty to make reasonable accommodation in the context of the Framework Directive, see generally G. Quinn, 'Disability Discrimination Law in the EU....' *supra* no.38.

Third, the positive duty is concerned with the development of effective policies and practices designed to create an inclusive environment and to break down structural barriers in the way of persons with a disability. They are general and not tailored to the circumstances of a particular individual with a disability. Reactive reasonable adjustment duty is entirely concerned with the identification of an appropriate and reasonable response to the specific circumstances of a particular individual although such a response may have the effect of removing a barrier which would otherwise have operated to disadvantage other persons with a disability. It may therefore be the case that a successful implementation of the positive duties would not only overlap with the anticipatory element of reasonable adjustment duties but the overlap is likely to encourage bodies subject to the both duties to discharge them together. This may ultimately result in a process whereby the both duties not only reinforce each other but lead to an increased awareness on the part of public authorities that their obligation is not simply to have 'due regard' to the need to promote disability equality, but also to take positive measures to facilitate access and inclusion for persons with disabilities. In other words, the duty to make reasonable adjustment moves the theoretical limits of the positive duty from that of respecting the difference of disability to positively accommodating it.

## **2 Mainstreaming and Participation**

Mainstreaming and Participation are concepts underpinned by notions of substantive equality and occupy a central position in the operationalisation of the statutory duty to promote equality.<sup>148</sup> The question that arises is how these concepts operate to foster the goals of the non-discrimination ideal and substantive equality in the disability context. First, their programmatic character do not only support and give substance to the statutory prohibition of discrimination but also help prevent situations where indirect discrimination might otherwise occur. Second, the both concepts may operate to ensure that the disadvantaged position of persons with disabilities is taken in to account in the formulation and implementation of policies.

### **2.1 Mainstreaming and the Positive Duty on Disability.**

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<sup>148</sup> See generally C. O'Cinnede, 'A New Generation...' *supra* no.2, pp 219-248. For the position under the repealed Disability Discrimination Act (DDA) 1995, see the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (SI 2966/2005) Reg 2(2) and (3).

The positive duty on equality is a legislation which is deliberately designed to bring about ‘mainstreaming’ of disability equality.<sup>149</sup> This proposition is linked to the statutory requirement on public authorities to pay ‘due regard’ to the promotion of equality. A rationale for mainstreaming rest partly in the perception that questions of equality and non-discrimination may easily become sidelined by policy makers who do not view that particular policy preference as central to their concerns.<sup>150</sup> By requiring public bodies to integrate the concerns and needs of persons with disabilities in to all areas of policy and practice, mainstreaming has the potential of focussing the attention of public authorities on issues of disability equality. Its group dimension ensures that the disadvantaged position of marginalized groups such as persons with disabilities is taken into account in the process of policy formulation and implementation by integrating equality for these groups of persons into the systems and structures of an organisation.<sup>151</sup>

Both the United Nations and the Council of Europe have recognized mainstreaming as a strategy for the design and delivery of substantive equality for persons with disabilities. Article 4 of the United Nations Convention on the Rights of Persons with Disabilities sets out the ‘general obligations’ of the states under the convention, listing the mainstreaming of disability perspective into all policies and programmes as one of the strategies which must be adopted in pursuance of the general obligation to ensure the full realisation of all human rights by persons with disabilities.<sup>152</sup> The Council of Europe's current 10-year Action Plan to promote the rights and full participation of persons with a disability identifies

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<sup>149</sup> See generally The Equality and Human Rights Commission’s Essential Guide to the Public Sector Equality Duty: guidance for English public bodies (and non-devolved bodies in Scotland and Wales) , Vol. 1 of 5 Equality Act 2010 available at [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/PSED/essential\\_guide\\_guidance.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guidance.pdf). With regard to the DDA 1995, see The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 No. 2966.

<sup>150</sup> C. McCrudden, ‘Review of Issues Concerning the Operation of the Equality Duty’ in E. McLaughlin and N. Faris (eds), *Section 75 Equality Review—An Operational Review* (Belfast, 2004).

<sup>151</sup> *R (Chavda) v Harrow London Borough Council* (2007) EWHC 3064.

<sup>152</sup> ICPRD Art.4

mainstreaming and training as universal design principles and described them as 'vital elements' of its implementation strategy.<sup>153</sup>

### **2.1.1 Mainstreaming as substantive Equality.**

Within the context of disability, mainstreaming has been conceptualised as a substantive approach to policy making and service delivery based on the social model of disability. It builds on the notion of difference and gives effect to the right of equal treatment and non-discrimination by addressing systemic issues of institutional discrimination that may not be covered by the prohibition against direct discrimination. Most of the discrimination in the context of disability will not generally be premeditated or motivated by malice. Rather, much of the discrimination are covert, arising from 'thoughtlessness or the unquestioning acceptance of long established ways of doing things that has left a legacy of institutional practices that effectively exclude persons with disabilities'<sup>154</sup> it is this form of discrimination that impacts most in the context of disability and leaves open the theoretical possibility of indirect discrimination arising for which the general objective defence of a legitimate aim pursued proportionately would be no answer. The essence of mainstreaming is to ensure that such discrimination is not perpetuated by requiring that organisations scrutinise their policies and practices for any discriminatory impact.

### **2.1.2 Mainstreaming and the Duty to Make Reasonable Adjustment**

The group dimension of mainstreaming ensures that the focus is on the structures of an organisation that are likely to perpetuate group disadvantage rather than on individual acts of discrimination. In this respect, mainstreaming has a particular resonance with the section 29 Equality Act 2010 anticipatory reasonable adjustment duty on public authorities. A salient element of the anticipatory nature of the duty to make reasonable adjustment is the fact that it requires service providers to scrutinize their physical features, provision, criteria and practices in order to identify the disproportionate disadvantage they may cause to persons

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<sup>153</sup> 'The Council of Europe Action Plan to Promote the Rights and full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015', Recommendation of the Committee of Ministers, no. R (2006) 5, 2006.

<sup>154</sup> G Quinn, 'Disability Discrimination Law in the EU....' Supra no. 38. Pp 260.

with disabilities. Scrutiny will require that consideration be given to how potential ‘barriers’ arising from problematic physical features, provisions, criteria or practices might be removed, altered or avoided. Scrutiny would involve carrying out a thorough impact assessment, of an organization’s policy procedures and practices. This requirement that public bodies scrutinize their policies, practices and functions contained in the Section 29 anticipatory duty to make reasonable adjustment and conceptualized as mainstreaming is immensely significant to equality for persons with disabilities. It has the potential of driving and encouraging service providers to think in advance about removing barriers experienced by persons with disabilities. It operates to deny service providers of an excuse to treat persons with disabilities ‘less favourably’ on the basis that, because they did not know in advance that an adjustment was required, it was not reasonable to provide one.

In addition, mainstreaming like the section 29 duty create a continuing obligation so that adjustments made will not discharge the public authority once and for all. Instead, compliance must be kept under continuing review. This is a significant requirement of mainstreaming as it recognizes that equality for persons with disabilities is not a static concept; it is dynamic and cannot be achieved in a single instance. This is particularly significant with regard to the provision by public authorities of services to persons with disabilities as the introduction of new systems and technologies may create both fresh obstacles for this group of persons and new and innovative means of overcoming them.

However, it may be the case that the statutory requirement to mainstream has a much greater potential to deliver substantive equality for persons with disabilities than the Section 29 duty. First, unlike the Section 29 duty, the statutory requirement to mainstream is not limited only to the delivery of services but includes all the range of an organization’s policies and functions, including employment. Second, unlike the reasonable adjustment duty mainstreaming places the issues of discrimination and equality within the wider policy context of an organization. Equality and non-discrimination laws, however well crafted and carefully implemented, can never achieve meaningful social change in isolation. Their effectiveness will depend on the wider policy context in which they operate. Furthermore, mainstreaming encourages a joined up approach to tackling discrimination against and

promoting equality for persons with disabilities. In fact, it may be the case with disability that the failure of our local authorities to link up policy actions on areas such as independent living, housing, benefit entitlements, transport, employment services and health and safety are likely to be the cause rather than the effect of discrimination against persons with disabilities. Substantive equality and non-discrimination for persons with disabilities will only be achieved if concerted efforts are made across the various policy areas.

The concept of mainstreaming could also be linked to the reactive duty to make reasonable adjustment in a way that promotes substantive equality for persons with disabilities. A common criticism of conventional mainstreaming equality is that, while it focuses attention on the circumstances of disadvantaged groups in policy design and implementation it does not necessarily provide for positive action to accommodate the individual person with a disability. An over emphasis on the systems and processes of an organization may tend to lose sight of the individual and thus undermine substantive equality. In this context, the concept of 'reasonable adjustment' can operate as the 'cure' to mainstreaming by refocusing attention on the circumstances of the specific individual. Mainstreaming could also operate as a defence against a charge of failure to take positive action. The ECHR has taken into account the fact that a policy had been impact assessed or mainstreamed when deciding whether a disabled person's right had been breached. In *Marzari v Italy*<sup>155</sup> the Court was influenced by the fact that the State had set up a specific Commission for the study of metabolic diseases which had taken the view that the house offered to the applicant would have been adequate. This convinced the Court that the competent authorities had acted only after carefully weighing all the alternatives and collecting all relevant information regarding the possible impact on the fundamental rights at stake.

### **2.1.3 Mainstreaming and the Concept of Universalism.**

Within the context of the social model of disability, mainstreaming bears a unique affinity to the Universalist's conception of disability which dictates that policies on disability equality should reflect a universal design to accommodate the needs of everyone and not for a few with a narrow range of ability. Unlike the minority rights perspective which sees disability as a

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<sup>155</sup> *Marzari v Italy* App no. 36448/97 (1999) 28 EHRR CD 175.

group defining characteristic, the Universalist approach renders as irrelevant the equality-difference divide by holding that disability is not ‘special’ because it is not a human attribute that demarks one position of humanity from another. The Universalist approach recognises that the population as a whole is at risk from acquiring impairment and chronic illness and that ageing will inevitably increase the proportion of people with impairments. The universalist perspective would certainly support the extension of the duty to make reasonable adjustment to the area of age discrimination.

Normatively the minority rights perspective has a tendency to reinforce the equality/difference dichotomy by emphasising on the impairment of persons with disabilities. The consequence here is that seen persons with disabilities as distinct from the rest of the population may hinder rather than promote social cohesion which is an underlining objective of the statutory duty on equality. The minority right perspective would support a narrow and restrictive definition of disability which may sit uncomfortably with the underlying aims of the equality duty.

#### **2.1.4 Mainstreaming through Impact Assessments .**

Impact assessment is not only a core requirement of the operationalisation of the positive duty on public authorities but is also a mechanism by which equality mainstreaming is effected. It involves an attempt to assess what the effect of a policy is, or would be, on particular groups in society. With regard to disability, a key factor that would have to be taken in to account in assessing the likely effect of any policy or practice will be the disadvantaged position in society of persons with disabilities.<sup>156</sup> Impact assessment necessitates defining what the impact of policies is at an earlier stage of policy making and bears a particular affinity to the s29 Equality Act 2010 anticipatory reasonable adjustment duty. By requiring public bodies to take action to assess and monitor the impact of policies and practices upon persons with disabilities, as well as consulting with this group of citizens, the impact assessment procedure operates to ensure that policies and practices are carefully scrutinized for any disproportionate impact and necessary and appropriate action taken to eliminate it.

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<sup>156</sup> R v Birmingham City Council and M, G and H v Birmingham City Council (co-joint appeals) [2011] EWHC 1147 (Admin).



Furthermore, by being proactive rather than reactive, impact assessments provide a mechanism for alerting policy makers to potential problems of inequality before they happen. Thus through impact assessment it is more likely that a generally reactive approach to problems of inequality can be replaced by pro-active early-warning approaches.<sup>157</sup> The anticipatory nature of impact assessment on equality was emphasised in *Elias v Secretary of State*<sup>158</sup> where in holding that the Secretary of State was in breach of his duties under section 71 of the Race Relations Act 1976, the court pointed out that the purpose of the section is to ensure that the body subject to the duty pays due regard at the time the policy is being considered, that is when the relevant function is being exercised and not when it has become the subject of challenge.

Two approaches to impact assessment has been identified; the expert-bureaucratic model and the participatory-democratic model. Under the expert-bureaucratic model, assessing equality impact is regarded as a task to be performed by specialists or bureaucrats with specialized training as well as a sophisticated understanding of equality issues.<sup>159</sup> Under the alternative participatory-deliberative model a range of individuals and organizations outside the organisation are encouraged to contribute to the impact assessment process. This model promotes participation and access to policy-making by persons with disabilities and emphasizes the accountability of experts and officials. The positive duty appears to combine both models by transforming impact assessment from a technocratic tool to an institutional manifestation of deliberative democracy.

## **2.2 Participation.**

Participation is a central concept in the operationalisation of the statutory duty on equality which has the potential to deliver substantive equality to persons with disabilities.<sup>160</sup> Participation

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<sup>157</sup> C. McCrudden, 'Review of Issues Concerning the Operation of the Equality Duty....' Supra no.150.

<sup>158</sup> [2006] EWCA Civ 1293

<sup>159</sup> F. Beveridge, S. Nott, K. Stephen, *Mainstreaming and the engendering of policy-making: a means to an end?*, EPP 7 2000, 3, pp 385-405.

<sup>160</sup> The participation of persons with disabilities in the development of the equality schemes was a central requirement under the DDA 1995, see Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 (SI 2966/2005) Regulations 2(2) and 2(3)(a). Under the public authorities will be expected only to engage with persons with disabilities in the development of equality priorities.

is not only a positive action measure<sup>161</sup>) but is also a fundamental human right value<sup>162</sup> which does not only have the potential to improve the quality of decisions in an organisation but which also could measurably enhance the principle of self-determination and the anti-discrimination ideal.<sup>163</sup> Participation rights are particularly important in the context of disability as it increases the democratic dimension to policy making and undermines the culture of protectionism and paternalism which characterises bureaucratic decision-making. It may be the case that much of the institutional discrimination against persons with disabilities, involving the neglect or lack of understanding of their specific needs arises from the fact that decisions intended to promote disability equality 'are sometimes taken in 'the best interests' of persons with disabilities and yet in complete ignorance of their expressed wishes.'<sup>164</sup> The requirement of participation could constitute a powerful legislative tool for galvanising persons with disabilities and their representative organisations to act in concert to put pressure on public authorities to take their concerns seriously.<sup>165</sup>

The concept of participation as a positive measure builds on and has a particular resonance to the group disadvantage approach under the anticipatory reasonable adjustment duty. The centrality of individualism to the reactive reasonable adjustment duty is potentially a

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<sup>161</sup> The committee on the European Social Charter has determined that Article 15(3) of the Charter on Fundamental Rights in Europe requires that persons with disabilities and their representative organisations should be consulted in the design and ongoing review of positive action measures and that an appropriate forum should exist to enable this to happen. See *Autism-Europe v France* (1994), Collective Complaint 13 in the context of employment, see EU Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

<sup>162</sup> At the level of the United Nations, Preamble (O) of the Convention on the Rights of Persons with Disabilities confirm the right of this group of persons to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.

<sup>163</sup> Professor Fredman identifies the participation of disadvantaged groups in the 'process of norm setting' as 'one of the key distinguishing features of pro-active models' of equality; see S. Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' 12 (2005) *Maastricht Journal of European and Comparative Law* p.369. Also, J. Schoonheim and D. Ruebain, 'Reflections on Inclusion and Accommodation in Childhood Education: From International Standard Setting to National Implementation' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford and Portland, Hart Publishing 2005) pp163-185.

<sup>164</sup> G. Quinn 'The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose' supra no.42 pp 279-304.

<sup>165</sup> For an exploration of how community organisations have influenced the equality agenda in Northern Ireland, see M. Beirne, 'Social and Economic Rights as Agents for Change' in C. Harvey(ed), 'Human Rights in the Community, Rights as Agents for Change' (Hart Publishing 2005) pp43-62.

problem to the attainment of substantive equality for persons with disabilities. The reactive duty to make reasonable adjustment remains quintessentially individualised, with a strong tendency to treat vastly different phenomena as equivalent. Theoretically, an individual's need for a white cane becomes as meaningful as their educational background. In other words, it is as important to accommodate the individual in need of a white cane as the person who has been educationally disadvantaged. The reactive reasonable adjustment duty therefore has a potential to deflect attention from the societal and historical practices that perpetuates the discrimination against persons with disabilities. The concept of participation instantiates the basic dichotomy between making adjustments for instrumental, efficiency reasons and making adjustments for intrinsic, justice reasons.

### **2.2.1 Participatory Democracy as Substantive Equality.**

The requirement that public authorities involve persons with disabilities and other stakeholders in the decision making process of the organisation makes the role of inclusive deliberation particularly central to the anti-discrimination ideal. In the context of disability, the idea of group representation assumes that persons with disabilities have some set of common attributes of interests which, if identified and well represented in the democratic process will promote the delivery of substantive equality.<sup>166</sup> This is not necessarily the case. Persons with disabilities are not a homogeneous group with the same or similar needs. In fact, apart from the fact that different impairments generate different needs, persons with disabilities have life histories that make them very different people, with different interests and different ambitions.<sup>167</sup> Thus a concern with the concept of group representation is that the unifying process required by group representation may try to freeze fluid relations into a unified identity, which can re-create oppressive exclusions and thus perpetuate rather than eliminate discrimination.<sup>168</sup>

### **2.2.2 Participation and the Definition of Disability**

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<sup>166</sup> I. Young, *Inclusion and Democracy* (Oxford, OUP 2002) pp52-77.

<sup>167</sup> J Bickenbach, 'Minority Rights or Universal Participation....' Supra no 122.

<sup>168</sup> I Young supra no. 166.

Participation in the development of positive programs will depend on identifying the particular group of persons with disabilities to be involved and this will necessitate defining clearly who is a disabled person. The Equality Act 2010 defines a disabled person as a person who has a disability,<sup>169</sup> or has had a past disability.<sup>170</sup> According to schedule 1(a) (b) of the Act, a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The Equality Act 2010 applies a similar definition of the disabled person to that under the DDA 1995.<sup>171</sup>

The statutory definition of disability in the Equality Act 2010 is strongly underpinned by the medical model of disability which views disability as stemming from the individual and as intrinsically linked to their impairment.<sup>172</sup> The focus is on the impairment of the individual and there is inadequate recognition of the role of social and environmental factors in creating disability and disadvantage.<sup>173</sup> The question to consider is whether the medical orientation of the statutory definition of disability, and the particular consequences that flow from it, are compatible with the aims of the positive duty to promote disability equality. In this regard, it is important to note that the public sector equality duty is rooted in the ethos of the social model which shifts the focus of disability from the impairment of the individual to the issue of discrimination arising from the interreaction between persons with a disability and broader social and economic forces. Its focus is on the question of how institutions, organisation and processes which constitute society compound the discrimination experienced by persons with disabilities because of their functional limitation.<sup>174</sup>

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<sup>169</sup> Section 6 (2) Equality Act 2010.

<sup>170</sup> Section 6 (4) (a) Equality Act 2010. Also, Sch 1 s9.

<sup>171</sup> DDA 1995, s1(subject to the provisions of Sch 1, the revised statutory guidance and the Disability Discrimination(Meaning of Disability) Regulations 1996, SI1996/1455.

<sup>172</sup> Section 6 (1) (a) Equality Act 2010.

<sup>173</sup> For detailed analysis of the 'medical model' of disability, see generally M. Oliver, *The Politics of Disablement* (London, The Macmillan Press Limited 1990). Also J Bickenbach, 'Minority Rights or Universal Participation: The Politics of Disablement' supra no.122 pp 101-116.

<sup>174</sup> J. Bickenbach, *ibid*.

It is plausible to argue that this formulation places the focus more on the experience of discrimination and not so much on the impairment of the individual. The Social model of disability affords public authorities considerable latitude in determining the outer boundaries of the definition of disability and to limit participation to certain kinds of disability or to disabilities reaching a certain degree would not be consistent with the underlying goals of the substantive equality encapsulated in the Public sector equality duty.

### **2.2.3 The Concept of Empowerment.**

The liberating potential of the Public Sector Equality Duty may lie in its recognition that participation involves identifying and addressing barriers to self-actualization. A key aspect of this is 'empowerment', the process of supporting individuals and groups in exercising as much control over their own lives as possible.<sup>175</sup> Empowerment results from awareness, knowledge and participation. It builds on the concepts of choice and control and includes the notion of personal development, consciousness-raising and social action. The requirements of participation in equality mainstreaming processes is aim at empowering persons with disabilities to engage with public authorities to address equality issues of relevance to the public authority.<sup>176</sup> Of particular interest here will therefore be the potential for the requirement of participation not only to galvanize 'new' constituencies of persons with disabilities but also to empower them to become agents for their own and society-wide change.<sup>177</sup>

### **2.2.4 Accountability and Transparency.**

An important objective of the statutory duty on equality is to bring about greater accountability and transparency in public authorities. In the context of disability, the concept of participation provide a mechanism for persons with disabilities to challenge how public bodies designed and implement policies and programs in fields such as housing, transport, welfare and social security so as to ensure that they meet their actual needs. In other words, the concept of

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<sup>175</sup> S. Witcher, 'Mainstreaming Equality Theories: Towards a Generic Model of Discrimination', accessed in July 2007, available at [www.creid.ed.ac.uk/events/seminar/](http://www.creid.ed.ac.uk/events/seminar/)

<sup>176</sup> C. O'Cinneide, 'A New Generation of Equality Legislation?... supra no.2. Pp 219-248.

<sup>177</sup> M. Beirne, 'Social and Economic Rights as Agents of Change...' supra no. 165 Pp9-28.

participation could serve as a corrective or reality-check on policies and positive action programs to ensure that they do not become very detached from what persons with disabilities actually need.

The insistence on the rule of law in human rights stems from the fact that governance is the exercise of power and should therefore be subjected to safeguard against the impulse towards totalitarianism. A crucial element of human rights safeguard is the accountability of public authorities to those over whom they exercise power. Transparency necessitates explicit standards against which governmental performance is measure. A key mechanism for enhancing transparency and accountability between public authorities and persons with disabilities is participation.<sup>178</sup>

### **3 The Positive Duty and Human Rights.**

There is a relationship between the positive duty to promote disability equality and human rights.<sup>179</sup> The right of persons with disabilities to equal treatment and non discrimination is deeply entrenched in international human rights law.<sup>180</sup> The discrimination against and harassment of persons with disabilities undermines their autonomy, their right to participate as equal members of the community and the right to be treated with respect and dignity.<sup>181</sup>

#### **3.1 Building a Human Rights Culture**

##### **3.1.1 The Role of Relevant International and Regional Human Rights Instruments**

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<sup>178</sup> M. Lodge, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, Edward Elgar Publishers 2004) Pp124-144.

<sup>179</sup> *Eldridge v British Columbia* (1997)3 RCS 624; For a comprehensive review of the relationship between human rights and disability in the European Union see G Quinn, 'The Human Rights of People with Disabilities in the EU law. Supra no.30 p.290.

<sup>180</sup> Universal Declaration of Human Rights 1948 Article 1. International Convention on Economic, Social and Cultural Right (ICESCR) Article 2(2); International Convention on Civil and Political Rights (ICCPR) Article 26 and United Nations Convention on the Rights of Persons with Disability(UNCRPD) Article 1.

<sup>181</sup> *Price v UK* (2002) 34 EHRR 1285. Application No. 33394/96; *Bernard v Enfield LBC* (2000) EWHC 449.

The role of international and regional human rights instruments in the context of the statutory duty to promote equality could be located on three major levels. First, these instruments provide an idea of the context in which UK domestic discrimination law operates. Generally, the protection of human rights through international obligations is only binding on states that have signed the relevant international instrument.<sup>182</sup> Thus, the UK government is bounded to uphold and protect the rights of persons with disabilities contained in any international instrument to which it is signatory.

In fact, Article 1 of the ECHR obliges member states to respect the obligation arising from the convention and from any other international convention or treaty to which the member state is a party.<sup>183</sup> However, most of the international provisions, whether ratified by the UK or not, are not directly applicable in domestic law. However, in cases of genuine ambiguity, the courts will adopt an interpretation of legislation which is consistent, rather than inconsistent, with international obligations undertaken by the UK government if the words of the statute are reasonably capable of bearing such a meaning.<sup>184</sup>

Second, these instruments espouse certain important moral and ethical principles and values which could shape the goals, structures, and practices of public bodies.<sup>185</sup> It is now firmly established that Human rights are not just about liberty and freedom from arbitrary or unjustified state action but engage other moral values such as equality, distributive justice and human dignity.<sup>186</sup> Third, A central feature of the rights encapsulated in these international and regional human rights instruments is their universality. These instruments require States to confer and protect the relevant rights on a universal basis, on all citizens, including persons with disabilities.<sup>187</sup> Thus, prohibitions on discrimination figure strongly in all the international and regional human rights instruments.

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<sup>182</sup> E. Palmer, 'Judicial Review, Social-Economic Rights and the Human Rights Act' supra no.133; J. Cooper, 'Improving the Rights of People with Disabilities through International Law' supra no.64 p 59.

<sup>183</sup> K. Monaghan, 'Equality Law supra no.51 p. 143.

<sup>184</sup> Ibid.

<sup>185</sup> F. Butler, 'Building a Human Rights Culture' in C. Harvey (ed) *Human Rights in the Community: Rights as Agents of Change* (Oxford & Portland, Oregon, Hart Publishing 2005).pp 63-80.

<sup>186</sup> C. McCrudden, ' Mainstreaming Human Rights' in C. Harvey (ed) *Human Rights in the Community: Rights as Agents of Change* (Oxford & Portland, Oregon, Hart Publishing 2005)pp 9-28.

<sup>187</sup> A. Lawson 'Disability Equality in Britain, The Role of Reasonable Adjustment,supra no.68 pp 17.

### 3.1.2 The Duty to Fulfil Human Rights

It is now established that the state has a positive duty to promote and to fulfil human rights<sup>188</sup> and that human rights, equality and non-discrimination have a fundamental role to play in the operationalisation of the welfare state.<sup>189</sup> This recognition has led to a fundamental reshaping of the understanding of the state's responsibility and its relationship to rights within the welfare state itself. The state's responsibility is no longer conceived of as a unidirectional provider of a package of benefits, but instead in terms of facilitation and empowerment of individuals. In the same vein, persons with disabilities are characterised as active agents capable of defining the course of their lives and not just as passive recipients of welfare benefits.<sup>190</sup>

An added value of the Public sector equality duty is the fact that it blurs the originally sharp divide between equality, non-discrimination and human rights both at the legislative and institutional levels.<sup>191</sup> At the legislative level, the duty brings the discharge of public functions within the ambit of non-discrimination legislation<sup>192</sup> and at the institutional level, Part 1 of the Equality Act 2006 established the Commission for Equality and Human Rights (CEHR) whose functions includes the promotion of equality and human rights. This convergence between human rights and non-discrimination resonates positively with the government's 'modernisation agenda' of the public service encapsulated in the 'human rights culture'.<sup>193</sup>

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<sup>188</sup> S. Fredman, 'Human Rights Transformed Positive Duties and Positive Rights' (2006) *Public Law* pg 498-520. See also, C. McCrudden, 'Mainstreaming Human Rights' *supra* no.179 pp 1028.

<sup>189</sup> See the constitution of the Republic of South Africa (1990); also *Grootboom v Government of the Republic of South Africa* (2001) 1 SA 46(CC) PARA23; S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *South African Journal on Human Rights*. 164, p180; see also M. Wesson, 'Equality and Social Rights: An Exploration in the Light of the South African Constitution' (2007) *Public Law* pp748-769.

<sup>190</sup> S. Fredman, 'Human Rights Transformed Positive Duties and Positive Rights' *supra* no.181 pp 498-520.

<sup>191</sup> A. Lawson, *Disability and Equality Law in Britain* *supra* no.68 Pp 15 & 16; Also S. Spencer, 'Partner Rediscovered: Human Rights and Equality in the UK' in C. Harvey (ed), 'Human Rights in the Community, Rights as Agents of Change' (Hart Publishing 2005) pp29-42.

<sup>192</sup> Section 29(6) and (7), Equality Act 2010; see also, Section 21 Disability Discrimination Act 1995

<sup>193</sup> F. Butler, Building a 'Human Rights Culture....' *Supra* no. 185 pp63-80; see also 'A Guide to the Human Rights Act 1998' (Department for Constitutional Affairs Third Edition October 2006) available at [www.dca.gov.uk](http://www.dca.gov.uk).



The introduction of the Human Rights Act 1998 did not only lead to the articulation of new rights by the courts but, most importantly led to some rethinking of the goals of public policy in relation to human rights standards. A culture of human rights has two dimensions, institutional and ethical. The institutional dimension requires that human rights should shape the goals, structures, and practices of public bodies. In other words, the principles enshrined in all the international and regional human rights instruments to which the UK government is a signatory must guide public bodies in their decision making and service delivery.<sup>194</sup> In this respect, the anti-discrimination ideal will entail a whole range of obligations for public authorities, which reach far beyond a legal prohibition of discrimination.

## **3.2 Substantive Equality and Human Rights.**

### **3.2.1 The concept of Equality as a Human Rights Value**

The concept of equality is a core human rights value which is at the heart of the Public Sector Equality Duty. At the least, the value is not only presumed to apply equally to every human being but also constitute the basis of the notion that democratic society is 'founded on the principle that each individual has equal value' and that their rights should be protected accordingly.<sup>195</sup>) In the context of disability, Equality provides a benchmark for securing the effective equal enjoyment of other rights such as liberty, the right to health care, the right to education, and the right to employment to persons with disabilities. The centrality of equality as a core human right is expressed in the Universal Declaration of Human Rights 1948 which provides that all human beings are born free and equal in dignity and rights.<sup>196</sup>

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), through which the Universal Declaration is given effect, both regulate discrimination.<sup>197</sup> Also, Article 1 of the UN convention on the protection of the rights of persons with disabilities identifies the

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<sup>194</sup> F. Butler, *ibid.*

<sup>195</sup> B Hale, 'The Quest for Equal Treatment' 2005 *Public Law* p.571.

<sup>196</sup> Universal Declaration of Human Rights Art 1.

<sup>197</sup> Article 26 ICCPR and Articles 2(2) ICESCR.

promotion of equality as one of its purposes. Conceptualised as a Human Right, the notion of equality carries with it an element of what Queen refers to as Public Freedom.<sup>198</sup> Freedom in this context means far more than the absence of interference or repression. It encompasses a more positive and dynamic concept, carrying with it obligations to remove sources of ‘unfreedom’ that may hinder particular citizens from achieving or becoming what they regard as of value or that prevent them being treated with dignity and respect.<sup>199</sup> It is this positive notion of freedom which demands positive action from the State in order to ensure that rights are genuinely conferred on all, that underpins the positive duty to promote disability equality.

### **3.2.2 Dignity as Substantive Equality.**

Another core human rights value implicated in the requirement to promote disability equality is the notion of dignity for persons with disabilities.<sup>200</sup> The discrimination and harassment of persons with disabilities is ethically and morally untenable as it undermines their human dignity. The notion of dignity is closely related to the concept of equal treatment.<sup>201</sup> Direct discrimination is defined as less favourable treatment.<sup>202</sup> Treating a person less favourably principally means treating him or her differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Also, the notion of dignity could provide a benchmark by which equality could be established for all citizens. If Public Authorities are to promote equality for persons with disabilities, they must understand the respect in which persons with a disability are equal to other members of the community. In this respect, it is plausible to assert that humans are equal in respect of their innate humanity, encapsulated in this instance, by the value of dignity. In achieving

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<sup>198</sup> G. Quinn, ‘The Human Rights of People with Disabilities Under the EU Law’ supra no.11 p. 281.

<sup>199</sup> S. Fredman, ‘Human Rights Transformed: Positive Duties and Positive Rights’ supra no.190. Also, T. Burchardt, ‘Capabilities and Disability: The Capabilities Framework and the Social Model of Disability’ 19 *Disability and Society* (2004) P735; C. Baylies, ‘Disability and the Notion of Human Development: questions of rights and capabilities’ *Disability & Society*, Vol. 17, No. 7, 2002, pp. 725-739.

<sup>200</sup> Section 3 Equality Act 2006.

<sup>201</sup> M. Wesson, ‘Equality and Social Rights: An Exploration in Light of the South African Constitution’ supra no.9 pp.748-769.

<sup>202</sup> Section 13 (1) Equality Act 2010; DDA, Section 3(a) (5); in its original enactment, the DDA 1995 did not outlaw Direct Discrimination. Section 3A(5) was inserted by the DDA 1995(Amendment) Regulations 2003 which came into effect on 1 October 2004 in conformity with the requirements of the Framework Directive. Section 3A (5) applied only to employment and related fields.

an equal society, equal worth could be pursued but equal dignity may not be compromised.<sup>203</sup> Thus, like substantive equality the principle of dignity would authorise measures that give preference to members of disadvantaged groups where such measures would restore their equal dignity.<sup>204</sup>

The principle that every human being must be treated with equal dignity is firmly grounded in the human rights discourse. The Universal Declaration of Human Rights 1948 does not only provide that 'all human beings are born free and equal in dignity and rights' but also describe human dignity as 'an inalienable right' which is inextricably linked to and 'derived from the 'inherent dignity of the human person'. The value of dignity has particular resonance for persons with disabilities. Its Recognition 'serves as a powerful reminder that persons with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility'.<sup>205</sup> It is not a contingent gift of the state and its existence does not depend on any considerations of social or economic utility. In fact, the respect of human dignity (is an end in its self and not a means to the ends of others'.<sup>206</sup> In this respect, a commitment to respect for human dignity would dictate that public authorities look beyond the boundaries of equal or identical treatment and to institute positive programs that would enable persons with disabilities to flourish. Dignity in this sense requires that persons with disabilities be given the opportunity not only to realize their potentials but also the 'chance to do their best, to thrive, to flourish, and to become what they wish to become'.<sup>207</sup>

Human dignity' was identified in *R v East Sussex CC ex parte A and B*<sup>208</sup> not only as an important dimension of the physical and psychological integrity of persons with disabilities

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<sup>203</sup> A & B v. East Sussex CC [2003] EWHC 167.

<sup>204</sup> R (Chavda) v Harrow London Borough Council (2007) EWHC 3064.

<sup>205</sup> G. Quinn and T. Degener, 'The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform' in Quinn and Degener (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (Geneva, UN 2002).

<sup>206</sup> Ibid.

<sup>207</sup> A Lawson, *Disability and Equality* supra no.68 pp 219-23.

<sup>208</sup> *R v East Sussex CC ex Parte A and B* High Court (Admin) CO/4843/2001, 18 February 2003.

embodied in Article 8 ECHR but also as a value which underlies most of the provisions of the ECHR as well as the European Charter on Fundamental Rights.

### **3.2.3 Duty to Make Reasonable Adjustment and Human Rights**

A concept that appears to embody or encapsulate the growing relationship between the ideal of non-discrimination and human rights in the context of disability is the requirement to make reasonable adjustment or accommodation.<sup>209</sup> In the human rights context, the duty to make reasonable adjustment carries with it a recognition that different treatment may sometimes be required in order to ensure that the human rights of persons with disabilities enjoy the same degree of respect, concern and protection as that accorded to the rights of the rest of the community.<sup>210</sup> Furthermore, such recognition carries with it an obligation on States to ensure that, where appropriate, persons with disabilities are treated differently from others. Treating them in the same way as others would be to fail to recognise differences in their circumstances and would result in a lesser degree of respect for, or protection of, their basic human rights. In this respect, Adhering to the concept of equal treatment may amount to a denial of the human rights of persons with disabilities. The notion of reasonable adjustment is therefore inherent in the effective recognition of universal human rights.

The UN's Human Rights Committee and its Committee on Economic Social and Cultural Rights have both stressed the relationship between equality and reasonable adjustment. In its General Comment No.18 the Human Rights Committee pointed out that Article 26 of the ICCPR may sometimes go beyond requiring equal treatment and demand different treatment.<sup>211</sup> These views are reflected in the Committee on Economic Social and Cultural Rights General Comment No.5 which stressed that Article 2(2) of the ICESCR required States to ensure that the rights conferred by that Convention should be enjoyed by all citizens

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<sup>209</sup> *Eldridge v British Columbia* (1997) 3 RCS 624.

<sup>210</sup> A. Lawson, *Disability and Equality Law in Britain...*supra no.68 Pp15-59; O. De Schutter, 'Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005). Pp35-64.

<sup>211</sup> UN Official Records, Supp no. 40, 1989(A/45/40) pp173-5, para 8.

without any discrimination on the ground of disability. For this purpose, it specified that disability-based discrimination included any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.<sup>212</sup>

There are certain implications of the Human Rights dimension to the duty to make reasonable adjustment which may impact on the anti-discrimination ideal of the positive duty to promote equality. First, the duty to make reasonable adjustment could be considered as a civil and political right to which the principle of progressive realisation does not apply. A failure to make reasonable adjustment is included in the definition of discrimination in the Equality Act 2010.<sup>213</sup> Article 26 of the ICCP prohibits discrimination and requires States to take measures to eliminate such discrimination immediately as the right to be free from discrimination is a civil and political right.<sup>214</sup> Situating the duty to make reasonable adjustment within the realm of civil and political rights could be controversial as they are not only proactive in nature but are likely to require financial expenditure. Second, the concepts of 'reasonableness' and 'undue burden' operate to ensure that the implementation of reasonable adjustment is infused with some degree of progressive realisation. These concepts embody a sensitivity and responsiveness to the particular circumstances not only of the individual with a disability in need of an adjustment but also to the circumstances of the duty bearer. The fact that these circumstances are likely to change over time imply that an adjustment that may at one time be considered to impose an undue burden or as unreasonable may not be so considered at a later point.

Third, the concept of reasonable adjustment challenges the traditional clear-cut division between civil and political rights, on the one hand, and the economic, social and cultural rights, on the other. The concept may legitimately be regarded as an integral element of non-discrimination. This situates it within the realms of civil and political rights.

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<sup>212</sup> General Comment no. 5 'Persons with Disabilities' adopted by the Committee on Economic, Social and Cultural Rights at its 11<sup>th</sup> session in 1994(UN Doc E/1995/220).

<sup>213</sup> For an individual and group dimension of the duty under the Equality Act 2010.

<sup>214</sup> CRPD Art.4 (2); Art. 2(1) of the ICESCR.

However, the fact that its implementation imposes positive resource-demanding obligations dictates that its realization could only be attained on a progressive basis. This conceptual duality inherent in the duty to make reasonable adjustment assigns to it a peculiar bridging role in the context of human rights law which could advance rather than obstruct the attainment of substantive equality.<sup>215</sup>

To the extent that it builds on, and extend the scope of the duty to make reasonable adjustment, the Positive duty to promote equality operate to move anti-discrimination law away from many of the dichotomies for which human rights law has often been criticised. In other words, the duty operates to ensure that rights of all kinds, whether economic, social and cultural on the one hand or civil and political on the other become available, in a meaningful sense, to persons with disabilities. Also, the public sector duty on disability equality acknowledges and demands that, in relation to every one of its general duties, inaction and non-interference by the State will not suffice. Positive steps are also required.

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<sup>215</sup> A. Lawson, *Disability and Equality Law in Britain* supra no. 68 pp30-3.

## **Chapter Three: The Prohibition of Discrimination.**

### **Introduction.**

A central concept engaged in the ability of persons with disabilities to participate fully in the social and economic life of the community is that of discrimination. Research has established that 52% of persons with disabilities believe that they have been discriminated against in the workplace and that this group of persons are at greater risk of targeted violence and hostility in the community.<sup>216</sup> The causes of discrimination against persons with disabilities are varied, ranging from their historically low status in society to the prevalence of inaccurate proxies or stereotypes concerning their assumed characteristics. However, the result of such discrimination could be what Professor Quinn refers to as ‘a crude and pernicious form of social determinism that arbitrarily telescopes the life chances of persons with disabilities.’<sup>217</sup> Public authorities are, therefore, required to eliminate disability discrimination as part of their statutory duty to promote equality. Implementing the duty requires determining in more detail what constitutes discrimination in the context of disability.

The main enactment outlawing discrimination in the UK is the Equality Act (EA) 2010.<sup>218</sup> The Act harmonizes and replaces most of the main enactments on discrimination, including the Disability Discrimination Act (DDA) 1995.<sup>219</sup> In the context of disability discrimination, the act gives persons with disabilities rights in employment and other areas of life and places an obligation on employers and providers of services, including public authorities in the

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<sup>216</sup> L.Cheshire, ‘Disability Review 2009’ compiled by C. Greenhalgh and E.Gore, available at <http://www.lcdisability.org/download.php?id=1381>. Also, C.H Sin, et al, ‘Disabled people’s experiences of targeted violence and hostility Research report: 21 (ECHR 2009) ISBN 978 1 84206 123 7 available at [http://www.equalityhumanrights.com/uploaded\\_files/research/disabled\\_people\\_s\\_experiences\\_of\\_targeted\\_violence\\_and\\_hostility.pdf](http://www.equalityhumanrights.com/uploaded_files/research/disabled_people_s_experiences_of_targeted_violence_and_hostility.pdf)

<sup>217</sup> G. Quinn, ‘Disability Discrimination Law in the European Union’ supra no.11 p.244.

<sup>218</sup> The Act came into force on 10<sup>th</sup> October 2010. Section 4 of Chapter 1, Part 2 of the Act lists disability as one of the protected characteristics.

<sup>219</sup> Prior to the Equality Act 2010, the DDA 1995 was the main enactment outlawing Disability Discrimination in the United Kingdom. Work on this project commenced in 2006 when the DDA 1995 was in force. Reference in the work will therefore be made to both the Equality Act 2010 and, where relevant to the DDA 1995.

discharge of their functions, to make reasonable adjustment for persons with disabilities.<sup>220</sup> This chapter will focus on disability discrimination arising in the context of employment and in the provision of goods and services.

The Equality Act 2010 defines a disabled person as a person who has a disability,<sup>221</sup> or has had a past disability.<sup>222</sup> According to Section 6(1) (a) and (b) of the Act, a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The EA 2010 applies a similar definition of the disabled person to that under the DDA 1995.<sup>223</sup> Thus, in order to establish whether a person has a disability under the EA, 2010, the courts are likely to follow the test laid down in *Goodwin v The Patent Office*<sup>224</sup> by looking at the evidence by reference to four different conditions or questions: first, whether the applicant has a mental or physical impairment;<sup>225</sup> second, Whether the impairment affects the applicant's ability to carry out normal day to day activities;<sup>226</sup> third, Whether the adverse effect is 'substantial' and fourth, whether the adverse effect was long-term.<sup>227</sup> It is significant that the Equality Act 2010 recognises that persons with disabilities are not a homogenous group. Section 6(3) (a) and (b) provide that, for the purposes of the Act, a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability and a

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<sup>220</sup> Part 2, Chapter 1 of the Equality Act 2010 deals with the prohibited characteristics, one of which is disability. Chapter 2 of Part 2 details the prohibited conducts. Part 3 of the Act deals with Services and Public functions while Part 5 is focused on Work. Chapter 1 of Part 5 deals specifically with Employment.

<sup>221</sup> Section 6 (2) Equality Act 2010.

<sup>222</sup> Section 6 (4) (a) Equality Act 2010. Also, Sch 1 Section 9.

<sup>223</sup> DDA 1995, Section 1(subject to the provisions of Sch 1, the revised statutory guidance and the Disability Discrimination(Meaning of Disability) Regulations 1996, SI1996/1455.

<sup>224</sup> 1999 IRLR 4.

<sup>225</sup> See Section 6 (1) Equality Act 2010. An impairment will amount to a 'Mental impairment' if it results from or consists of a clinically well-recognised illness. One way of establishing the existence of a mental impairment is to show proof of a mental illness classified in the World Health Organisation International Classification of Diseases (WHOICD). Many parts of its classification require specific symptoms to manifest themselves over a specified period. See generally, *Morgan v Staffordshire University* [2002] IRLR 190 at 195, para 20.

<sup>226</sup> Section 6 (2) Equality Act 2010.

<sup>227</sup> See generally, Sch 1 Equality Act 2010.



reference to persons who share a protected characteristic is a reference to persons who have the same disability.

## **1. Definition of Discrimination**

The Equality Act 2010 does not provide a single definition of discrimination. Rather, it defines discrimination in various ways and in relation to the protected characteristics. The four categories of disability discrimination are direct discrimination, indirect discrimination, discrimination arising from disability and a failure to make reasonable adjustment.<sup>228</sup> The Act also prohibits victimisation<sup>229</sup> and harassment<sup>230</sup> and Unlike the DDA 1995 which defined victimisation as a form of disability discrimination, the Equality Act 2010 does not treat victimisation as discrimination.<sup>231</sup> Combined discrimination will be outlawed as direct discrimination.<sup>232</sup>

### **1.1 Direct Discrimination**

The EA 2010 prohibits direct discrimination or less favourable treatment because of a person's disability.<sup>233</sup> Less favourable treatment is treatment which is less favourable than that given to, or would have been given to, a person not having that particular disability. While the treatment must be because of the person's disability, it is not mandatory that the comparator must be someone with a disability. In fact, the comparator may be someone who is not disabled. However, he or she must be someone who does not have the same disability as the disabled person. Nevertheless, it is important that the comparator's relevant

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<sup>228</sup> Section 25 Equality Act 2010.

<sup>229</sup> Section 26 Equality Act 2010.

<sup>230</sup> Sections 55(1) and 55(2) DDA 1995.

<sup>231</sup> Section 27 Equality Act 2010.

<sup>232</sup> Section 14 Equality Act 2010. Note that this section has not yet come into operation and there is currently no definite time scale as to when it is expected to come into force.

<sup>233</sup> Section 13 (1) Equality Act 2010. Direct discrimination is prohibited under the Framework Directive by Article 2(2) (a).

circumstances, including his or her abilities, are the same as, or not materially different, to those of the person with a disability.<sup>234</sup>

The Section 13 Equality Act 2010 prohibition of direct discrimination could be distinguished from the DDA 1995 definition in two principal domains. First, the reach of the Section 13 definition is wider than the definition of direct discrimination under the DDA 1995 and is capable of being construed to include situations of ‘associative’ discrimination and discrimination arising from perception. One of the criticisms of the repealed DDA 1995 was its failure to address a variety of situations where disability discrimination may arise, because the law did not protect victims of discrimination where they themselves do not suffer from impairment or even individuals who suffer discriminatory treatment as a result of a false perception of disability.<sup>235</sup> The focus of the law was on substantial impairment rather than on the phenomenon of discrimination itself. The issue of associative discrimination arose in the case of *Attridge Law v Coleman*<sup>236</sup> where a Legal Secretary who had a son suffering from disabilities alleged that she had suffered discrimination under the DDA 1995 as a result of being a carer for her son who had a disability. Even though she was not disabled herself, she argued that the Framework Directive offered protection from discrimination on ‘the grounds of disability’ and that the DDA should be construed broadly so as to implement this, and thus provide her with protection. The European Court of Justice established that the DDA definition of disability is capable of being interpreted so as to include persons who may themselves not be disabled in terms of having an impairment.

Second, the Section 13 prohibition of direct discrimination in the Equality Act 2010 appears to provide a stronger protection for persons with a disability against direct discrimination than the repealed DDA 1995. The section provides that there will be no issue of direct disability discrimination simply because, where the discrimination is against a person who is not

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<sup>234</sup> Section 23 (1) and (2) Equality Act 2010. If ‘reasonable adjustment’ can place the person with a disability in a ‘comparable situation’ then the person with a disability is, by definition, in a comparable situation for the purposes of the Act.

<sup>235</sup> K. Wells, ‘The Impact of the Framework Employment Directive on UK Disability Discrimination Law’ December 2003 Vol.32 No. 4 *ILJ* p253-273. For an analysis of an expansive definition of the scope of the potential protectorate in the context of disability, see G. Quinn, *supra* no.38.

<sup>236</sup> [2007] IRLR 89.

disabled, the result of the direct discrimination is that a person with a disability is treated more favourably.<sup>237</sup> In other words, the Act goes beyond providing for equal treatment for persons with disabilities and allows for positive discrimination in favour of this group of persons. Direct discrimination covers the more overt and prejudicial types of discrimination and it is significant to the protection afforded to persons with disabilities that it cannot be justified. In certain situations, the protection against direct discrimination overlaps with that provided for discrimination arising from disability and, because direct discrimination cannot be justified, it may provide a remedy where discrimination arising from disability might not

Section 14(1) of the Equality Act 2010 is intended to deal with combined discrimination: Dual characteristic which is discrimination arising because of a combination of two protected characteristics (“dual discrimination”).<sup>238</sup> Dual discrimination will be prohibited as direct discrimination.<sup>239</sup> Disability is one of the protected characteristics which may be combined, the others being age, gender reassignment, race, religion or belief, sex and sexual orientation.<sup>240</sup> For a claim of combined discrimination to be successful, the claimant must show that the less favourable treatment was because of the alleged combination of the relevant characteristics, as compared with how a person who does not share either of the characteristics in the combination is or would have been treated. A dual discrimination claim will not succeed where an exception or justification applies to the treatment in respect of either of the relevant protected characteristics. However, section 24 of the Act provides that it is no defense to a claim of direct or dual discrimination that the defendant shares the protected characteristic (or one or both of the protected characteristics) with the claimant. A person will still be liable for any unlawful direct disability discrimination even if he is himself disabled.<sup>241</sup> This would be the case even where the discrimination is one based on association or perception.

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<sup>237</sup> Section 13 (3) Equality Act 2010.

<sup>238</sup> This section has not yet come into force and there is no indication yet as to when this may happen.

<sup>239</sup> Section 14 (3) and (4) Equality Act 2010.

<sup>240</sup> Section 14 (2) Equality Act 2010.

<sup>241</sup> Section 24 (1) Equality Act 2010.

The prohibition of combined discrimination will constitute an important advancement to the protection afforded persons with a disability against discrimination. The DDA 1995, like the Sex Discrimination Act 1975 and the Race Relations Act 1976 only allowed for claims alleging discrimination because of the single characteristic of disability, sex and race respectively. The provisions of Section 14 allows persons with disabilities who have experienced less favourable treatment because of a combination of their disability and any other relevant protected characteristics to bring a direct discrimination claim where the single-strand approach may not succeed.

## **1.2 Indirect Discrimination**

Section 19, EA 2010 prohibits indirect discrimination which occurs where an employer or a provider of services applies an apparently neutral provision, criterion or practice which puts, or would put persons of a protected characteristics, and which actually disadvantages a person with the said characteristics, at a particular disadvantage compared with other persons who do not share the said characteristics, unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim.<sup>242</sup>

Unlike the Sex Discrimination Act (SDA) and the Race Relations Act (RRA) 1976, the Disability Discrimination Act (DDA) 1995 did not make any provision for indirect discrimination. However, the concept of indirect discrimination occupies a prominent place in the Employment Equality Directive.<sup>243</sup> An explanation often provided for its absence from the DDA was that much of its function was performed by the concept of reasonable adjustment. Significantly, the Equality Act does not only define indirect discrimination in almost the same way as the Framework Directive but also allows the concept to operate alongside the duty to make reasonable adjustment. Thus, understanding the relationship between the duty to make reasonable adjustment and the concept of indirect discrimination is

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<sup>242</sup> Equality Act 2010 Section 19 (2) (a) (b) (c) and (d). According to Section 19 (3), disability is one of the protected characteristics to which the provision of indirect discrimination applies.

<sup>243</sup> Article 2(2) (b): Council Directive 2000/78/EC of November 2000(The Framework Directive). The DDA 1995 was amended in 2003 to give effect to the EC Directive and introduced the concept of indirect discrimination. See DDA 1995(Amendment) Regulations 2003; SI 2003/1673.

important in understanding the anti-discrimination import of the public sector duty to promote equality.

The importance of the introduction of the concept of indirect discrimination into the corpus of our disability discrimination law does not only lie in its contribution to the concept of reasonable adjustment but also in its general potential to deliver substantive equality for persons with disabilities. First, the added value of indirect discrimination is that it is capable of reaching systemic issues of discrimination not normally covered by the prohibition against direct discrimination. Direct discrimination encompasses straightforward cases of direct and intentional discrimination against persons with disabilities motivated primarily by prejudice. However, most of the discrimination against persons with disabilities are indirect, arising from what Professor Quinn refers to as ‘thoughtlessness or the unquestioning acceptance of long established practices’ that has left a legacy of practices that effectively exclude persons with disabilities from the mainstream of society.<sup>244</sup> It has been pointed out that the Framework Directive does not only create an ambiguity between the concepts of indirect discrimination and the obligation to make reasonable accommodation but also allows for two types of defences against a charge of indirect discrimination.<sup>245</sup> The first defence is of general application to all the grounds (including disability) and it allows for an objective justification with a legitimate aim and pursued by necessary and appropriate means.<sup>246</sup> The second defence deals more specifically with the concept of indirect discrimination as applied to disability and is directly linked to the obligation to make reasonable accommodation.<sup>247</sup>

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<sup>244</sup> G. Quinn, *supra* no. 38 p.260.

<sup>245</sup> L. Waddington and A. Hendricks, 'The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination'18, 2002, *International Journal of Comparative Labour Law and Industrial Relations* p. 403. See also, G. Quinn *supra* no.38. p.261-2.

<sup>246</sup> The Framework Directive, Article 2(2) (b) (i).

<sup>247</sup> The Framework Directive, Article 2(2) (b) (ii)).

Professor Quinn has pointed out that the provision of Article 2(2) (b) (ii) is framed on an implicit assumption that not only will 'indirect discrimination' arise unless effectively responded to with 'reasonable accommodation' but also that the only available response or cure to 'indirect discrimination' where it is proven to occur in the context of disability is the provision of 'reasonable accommodation'.<sup>248</sup> The understanding here appears to be that, since many if not all of the barriers that arise in the context of indirect discrimination can be removed or avoided by invoking the duty to make reasonable adjustment, then 'indirect discrimination' will arise unless 'reasonable adjustment' is able effectively to remove the substantial disadvantage to persons with disabilities caused by the relevant provision, criteria or practice.

On his part, Professor De Shutter has highlighted the ambiguity inherent in the relationship between indirect discrimination and the obligation to make reasonable adjustment in the context of Article 8 ECHR, stating that 'Although the obligation to provide reasonable accommodation is a specific consequence of the general prohibition of indirect discrimination, it should not take priority over that prohibition or be seen as a substitute.....reasonable accommodation should be seen, rather, as subsidiary to the prohibition of indirect discrimination.'<sup>249</sup> Thus, where a provision, criteria or practice is shown to have an adverse impact on persons with disabilities, putting them at a particular disadvantage, it first has to be established whether it may be objectively justified by the pursuance of a legitimate aim by the appropriate and least restrictive means. It is only if the answer to this first question is in the affirmative can we then proceed to ask the further question: whether an effective adjustment would make it possible for the person with a disability not to be excluded.<sup>250</sup>

Second, there is a theoretical possibility that indirect discrimination may occur in the context of disability for which the provision of reasonable accommodation may not provide the solution under the provisions of the Framework Directive. This will be the

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<sup>248</sup> G.Quinn, *supra* no. 38. pp261-2.

<sup>249</sup> O. De Schutter, *Reasonable Accommodations and Positive Obligations in the European Convention of Human Rights* *supra* no.56 Pp.35-64.

<sup>250</sup> *Ibid.*

case where, even though ‘reasonable accommodation’ may be able to remove the relevant disadvantage, its provision is not possible because its provision could constitute a disproportionate burden on the employer. In such cases where it could be shown that it is not possible to achieve reasonable accommodation in practice, the notion of reasonable accommodation could operate as a defence against a charge of indirect discrimination.

### **1.3 Discrimination arising from Disability**

Section 15(1) of the Equality Act 2010 prohibits unfavourable treatment because of something arising in consequence of a person’s disability. This is referred to as discrimination arising from disability and may be compared to the disability-related discrimination concept under the DDA 1995.<sup>251</sup>

#### **1.3.1 The Issue of a Comparator**

The concept of Unfavorable treatment was introduced by the Equality Act 2010 in substitution of the conventional concept of less favourable treatment in disability-related cases which was applied by the DDA 1995.<sup>252</sup> In order to establish that a person with a disability had been the victim of disability-related less favourable treatment under the DDA, 1995, it was necessary to find a comparator: that is, a person to whom ‘that disability related-reason does not or would not apply’. The judicial interpretation of how to determine who the comparator should be was crucial in determining the strength of the protection afforded to persons with disabilities against discrimination. Until the decision of the House of Lords in *Lewisham v Malcolm*,<sup>253</sup> the leading case for establishing the comparator was the Court of Appeal case of *Clark v Novacold*.<sup>254</sup> In this case, the Court of Appeal identified two possible comparators: (a) Someone who did not have a disability, but who

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<sup>251</sup> The phrase ‘disability related discrimination’ is not used in the DDA 1995 but was used in the DRC Code of Practice to describe discrimination that fell under section 3A (1) DDA 1995. The disability-related discrimination provisions of the DDA 1995 had a wide scope and included less favourable treatment which does not amount to direct discrimination.

<sup>252</sup> Section 3A (1) DDA 1995.

<sup>253</sup> [2008] UKHL 43, [2008] 3 WLR 194.

<sup>254</sup> [1999] IRLR 318(CA).

was likely to be absent from work for about a year for non-disability-related reasons or (b) Someone who did not have a disability and who would remain in work for that period. The Court of Appeal decided that the correct comparator was the second as it would ensure that the test of less favourable treatment was based on the reason for the treatment of the person with a disability and not the fact of his having an impairment.<sup>255</sup> The conventional view was that the *Nova Cold* judgment was crucial in affording a stronger protection to persons with disabilities against both direct and indirect discrimination as it made it relatively easy for claimants to establish that they had been treated less favourably for a reason related to their disability.<sup>256</sup>

However, in *Lewisham v Malcolm*,<sup>257</sup> the House of Lords took a different and more restrictive view when deciding who the comparator should be. Their Lordships overthrew The *Novacold* construction of less favourable treatment and adopted the first and much narrower of the two constructions considered in *Novacold* with regard to the issue of the comparator.<sup>258</sup> *Based on the facts of the particular case, the House of Lords held that the treatment received by Mr. Malcolm must be compared with the treatment that might have been received by a person who had sub-let their flat despite the fact that they had no mental illness. The Council would have treated such a comparator in exactly the same way as it had treated Mr. Malcolm and his treatment would not therefore be considered as less favourable.*

The House of Lords' judgment in *Lewisham* substantially weakened the protection afforded to persons with disabilities by imposing a constraint on the reach of the disability-related less favourable treatment provisions of the DDA 1995.<sup>259</sup> It greatly offsetted the balance which the legislation intended to achieve between the rights of persons with disabilities and the interests of those with duties under the legislation. An underlining assumption of the legislation with regard to the concept of disability-related discrimination under the DDA 1995 was the understanding that it should be

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<sup>255</sup> Ibid, Mummery LJ para. 29-34.

<sup>256</sup> A. Lawson, *Disability and Equality Law in Britain*: supra no.68 pp131-2.

<sup>257</sup> [2008] UKHL 43, [2008] 3 WLR 194.

<sup>258</sup> The fact that the *Lewisham* case was a housing matter and the *Novacold* case was an employment matter may be significant, considering the fact that the concept of direct discrimination was not applicable under Part 3 DDA 1995. Direct discrimination only applied in the field of employment and could not be justified.

<sup>259</sup> *Dartford Borough Council v Richardson* [2009] EAT 0031.



relatively easy, when compared to cases of direct discrimination, for a person with a disability to be able to establish a prima facie case of less favourable treatment, which would be balanced by the opportunity for the duty holder to justify that treatment.<sup>260</sup> In fact, while the practical consequence of the Malcolm decision was to create a situation where, for instance, a blind person turned away from a restaurant because of his guide dog would probably no longer have been subjected to disability-related discrimination because he would not have been treated less favourably than a non-disabled person who attempted to enter with a dog, it is probable that the precise extent to which it could have affected the rights of persons with a disability to participate in the social and economic life of the community without discrimination would have depended, in part, on how public authorities are implementing the positive duty to promote disability equality and on the willingness of the courts to factor compliance of the duty in to the decision whether or not a person with a disability had been treated less favourably as a result of his or her disability.

The Equality Act 2010 has attempted to remedy the criticisms against the Lewisham decision with regard to the issue of a comparator. Section 15(1) does not require a comparator in order to establish that there has been discrimination arising from disability. The discrimination is defined in terms, not of less favourable but of unfavourable treatment because of something arising in consequence of the individual's disability and not for a reason related to his or her disability as was the case under the DDA 1995. The removal of the need for a comparator may theoretically remove the underlining justification for the controversial decision in the Malcolm case and focus the interest of the law on the disadvantage suffered by persons with disabilities. This reflects a substantive approach to disability equality whose ethos is embodied in the statutory duty to promote equality. By focusing the attention of duty bearers on proactively ensuring that their policies and practices are not discriminatory, the statutory duty to promote equality would go a long way in complementing the anti-discrimination provisions of the Equality Act 2010 in dealing with situations of systemic disability discrimination.

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<sup>260</sup> See generally Hansard, 24 January 1995, HC Debates, col 150.

### 1.3.2 Requirement of a Causal Link between the Less Favourable Treatment and the Claimant's Disability

For a disability-related discrimination claim to succeed under the DDA 1995, it had to be shown that the reason for the less favourable treatment is for 'a reason which related to the disabled person's disability'.<sup>261</sup> The question of the relationship between the less favourable treatment and the disability of the claimant under s3A (1) DDA 1995 was the subject of judicial interpretations which helped define the breadth of the protection afforded persons with disabilities under the Act. In *Clark v Nova Cold*<sup>262</sup> it was submitted that the question of the relationship between the less favourable treatment and the claimant's disability is one of fact, to be decided based on the facts of each case and requiring no comparisons to be made.

However, the House of Lords in the *Malcolm case* established that there must be a causal link between the reason and the disability and that a remoteness test may provide the basis for establishing the causal link between the two. Their Lordships found that there was no causal link between Mr. Malcolm's sub-letting of his council flat and his schizophrenia and that the reason for the unfavourable treatment was not sufficiently related to Mr. Malcolm's disability to fall within the ambit of disability-related discrimination.<sup>263</sup>

The need to establish a causal link between the reason for the less favourable treatment and a claimant's disability presented certain practical difficulties of proof under the DDA, 1995, Requiring in some instances recourse to medical evidence. In *Edwards's v Mid Suffolk District Council*<sup>264</sup>, the Employment Appeal Tribunal found that the Tribunal's failure to address the medical evidence which suggested that the claimant's behaviour might have been caused by his chronic anxiety disorder rendered its decision to dismiss the claim flawed. Recoursing to medical evidence in order to establish a connection between the reason and the disability is reminiscent of the hurdles faced by applicants under the DDA1995 in

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<sup>261</sup> Section 3A(1)(a) DDA1995

<sup>262</sup> G. Quinn, *supra* no. 38.

<sup>263</sup> *Lewisham LBC v Malcolm* [2008] UKHL 43, [2008] 3 WLR 194.

<sup>264</sup> [2001] ICR 616 (EAT).

establishing that a condition is impairment under the Act.<sup>265</sup> It had the potential of operating to limit the ability of the DDA to afford protection to many victims of indirect disability discrimination. Given the narrow and formal interpretation often given to the DDA definition of disability, it may be the case that many victims of disability-related discrimination may have been excluded from the protection of the law because the medical evidence did not establish the required degree of proximity between their disability and the reason for the discriminatory act.<sup>266</sup>

A central feature of the disability-related discrimination of the DDA, 1995 was the requirement that the reason of the less favourable treatment must relate to the disability of the disabled person bringing the case and not on the grounds of the disability of another person (Associative discrimination) or a disability they mistakenly assumed to have by the defendant (discrimination by perception). A linked effect of this limitation is the fact that no action could be brought by representatives of persons with disabilities based on their commitment to promoting disability equality. The implication here is that situations of disability discrimination may remain unchallenged simply because there was no particular person with a disability whose claim for less favourable treatment could be causally linked to the treatment in question. The Equality Act 2010 has now eliminated the requirement of a causal link between the reason for the less favourable treatment and the disability of the claimant in cases of discrimination arising from disability. Section 15(1) defines discrimination arising from disability in terms of something arising in consequence of the disabled person's disability and not because of a reason related to his or her disability. It is therefore very likely that the disability-related provisions of the Equality Act 2010, s15 (1) will be construed in such a way as to include associative discrimination and discrimination by perception. Also, interested organizations such as the Commission for Equality and Human Rights (CEHR) and representative disability organizations will be able to challenge criteria, practices and policies which are considered as unfavourable to persons with disabilities, whether or not there is a particular claimant whose disability could be causally linked to the unfavorable practice or policy. The advancement registered by the statutory duty to promote

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<sup>265</sup> DDA 1995, Section 1 (1), *Goodwin v The Patent Office* [1999] IRLR 4.

<sup>266</sup> Tribunals do not have an apt level of expertise on the medical area of disability and as a result the parties must have specific pleadings on the issue of impairment and adduce expert medical evidence. See generally, *Morgan v Staffordshire University* [2002] IRLR 190.

disability equality is the fact that it empowers persons with disabilities collectively to challenge the discriminatory policies and practices of our public authorities without the need to establish a causal link between such practices and the disability of an individual disadvantaged by reason of such policies and practices.<sup>267</sup>

## **2. Duty to Make Reasonable Adjustment**

Section 20 of the Equality Act 2010 contains a free-standing duty to make reasonable adjustment for persons with disabilities.<sup>268</sup> The duty applies to both employers, providers of services and Public authorities in the discharge of their functions and contains three main elements with regards to adjustments which may be required of the duty bearer;

First, it requires the duty bearers to take reasonable steps to change their provision, criterion or practice which puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.<sup>269</sup> Secondly, it requires them to take reasonable steps to overcome obstacles created by their physical features where these obstacles puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.<sup>270</sup> According to section 20(9) of the Equality Act,<sup>271</sup> where a physical feature puts persons with disabilities at a substantial disadvantage, employers and service providers have a duty to take reasonable steps to:

- a) remove the feature;
- b) alter it so that it no longer has that effect;

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<sup>267</sup> The statutory duty to promote equality could be enforced by way of a Judicial Review brought by a person with a disability or a representative organisation- see *R(Chavda) v Harrow LBC* [2007] EWHC 3064(Admin). Also, Equality Act 2006, Sections 31 and 32 gives the CEHR enforcement powers with regards to the statutory duties.

<sup>268</sup> A similar duty was imposed on employers by Section (4) DDA 1995 and on service providers by Section 21 DDA 1995.

<sup>269</sup> Section 20(3) Equality Act 2010.

<sup>270</sup> Section 20 (4) Equality Act 2010.

<sup>271</sup> See also section 21E (3) and (4) for public authorities.

c) provide a reasonable means of avoiding the feature; or provide a reasonable alternative method of making the service in question available to persons with disabilities.

Finally, it requires them to provide assistive auxiliary aids and services such as information on tape or brail or even the provision of a sign language interpreter where a person with a disability would, but for the provision of such an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.<sup>272</sup>

By section 21(2) of the EA, a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustment imposed on him in relation to the disabled person. Given the complexity of the duty to make reasonable adjustment under the EA 2010, a three-fold categorisation of the duties has been adopted in this chapter in order to probe the conceptual boundaries of the notion. The categories are the employment context, the provision of services and discrimination by Public Authorities in the discharge of their functions.

## **2.1 The Employment Context**

With regards to employment, section 39(5) of the Act imposes on employers a duty to make reasonable adjustment. This obligation applies in respect of applicants for employment as well as in respect of existing employees.<sup>273</sup>

### **2.1.1 The Meaning of ‘Provision, Criterion and Practice’**

The phrase ‘Provision, Criterion and Practice’ has not been defined by the Equality Act 2010.<sup>274</sup> However, the phrase is similar to the one used in Section 4 (1) DDA, 1995 which

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<sup>272</sup> Section 20 (5) Equality Act 2010.

<sup>273</sup> Schedule 8 Part 2 Equality Act 2010.

<sup>274</sup> The phrase is also used by the Framework Directive in its prohibition of discrimination.

provides that the phrase includes arrangements under the Act. The arrangements referred to include, first, the arrangements for determining who should be offered employment, and, secondly, any term, condition or arrangements on which employment, promotion, transfer, training or any other benefit is offered.<sup>275</sup> One of the most significant limitations to the meaning of arrangements under the 1995 Act was laid down by the Employment Appeal Tribunal in *Kenny v Hampshire Constabulary*<sup>276</sup> where a distinction was made between arrangements which are job related and which may trigger the reasonable adjustments duty and those which relate to personal care which, although having a significant impact on ability to perform a job, will not trigger the duty.

The EAT stated that the arrangements referred to by the Act are strictly job related. Employers are required to make adjustments to the way that the job is structured and organised so as to accommodate those who cannot fit into the existing arrangements. This appears to exclude providing assistance with personal arrangements and care so as to enable an individual to attend work.<sup>277</sup> The distinction between employment related arrangements and ‘personal needs’ items is not only blur but also had the potential ‘to be developed to create an undesirable exemption from the scope of the reasonable adjustment obligation.’<sup>278</sup> it can be argued that the duty to make reasonable adjustment should not operate only to open the doors to employment for a person with a disability but must also ensure that he or she is provided with the resources to enable his or her abilities to be put to work and to progress through the doors. A substantive understanding of the duty to make reasonable adjustment would require that resources be provided to make sure that persons with disabilities not only make use of employment opportunities but are able to stay in employment.<sup>279</sup> This may require that, in certain instances, provisions be made at work for the personal care of the employee with a disability. Such an approach may be necessary if the duty to make

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<sup>275</sup> Schedule 8 Part 1 (Para 5) Equality Act 2010 refers to these ‘arrangements’ as relevant matter.

<sup>276</sup> *Kenny v Hampshire Constabulary* [1999] IRLR 76.

<sup>277</sup> The question of whether an employer had made sufficient arrangements in the light of their knowledge is one of fact for the employment tribunal. See generally, *Clark v Novacold* (1999) IRLR318 (CA) where it was held that arrangements under section 6(2) did not include dismissals.

<sup>278</sup> See A. Lawson, *supra* no.68 p.74.

<sup>279</sup> S. Fredman and S. Spencer, ‘Equality: Towards and Outcome Focused Positive Duty’ *supra* no102 pp. 14 – 19.

reasonable adjustment is to be effective in removing the barriers to employment to persons with disabilities.

However, with the extension of the duty under s.20 (11) of the EA 2010 to include the provision of auxiliary services by employers, the position may now be different.<sup>280</sup> The provision of personal care facilities to accommodate the presence of an employee with a disability is likely to amount to the provision of an auxiliary service and thus represent a proactive approach to promoting disability equality. In fact, an employer may now be obliged to make adjustments to accommodate the presence of a personal carer even if the carer is provided by the employee with a disability himself. This will resonate positively with the 'significance of the concept of reasonable adjustment as a way of moving beyond respecting the difference of disability to accommodating it.

There is an important linkage between the duty to make reasonable adjustment and the requirement of 'reasonable accommodation' under Article 5 of the Framework Directive. The requirement of reasonable accommodation in the context of Article 5 entails an identification and removal of barriers in the way of persons with disabilities who, with reasonable accommodation, are able to perform the essential functions of a job.<sup>281</sup> In this respect, the meaning of 'arrangements' under the DDA, 1995 was given an expansive interpretation by the House of Lords in *Archibald v Fife Council*.<sup>282</sup> Where it was held that the essential functions of a job may themselves constitute the provision, criterion or practice which triggers a reasonable adjustment duty. Based on the facts of the case, Their Lordships established that 'arrangements' could be embodied in 'the terms, conditions and arrangements relating to the essential functions of the employment' of an employee with a disability and that once such an employee becomes disabled, these arrangements placed him or her at a substantial disadvantage as compared with his or her physically fit

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<sup>280</sup> Section 20(5) Equality Act 2010.

<sup>281</sup> L. Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, Hart Publishing 2005. Pp. 106-134.

<sup>282</sup> *Archibald v Fife Council* (2004) UKHL 32; (2004) IRLR.

colleagues who are still able to carry out the essential functions of the job. A reasonable adjustment duty will therefore be triggered in these circumstances.

The DDA 1995 did not explicitly specify that a person with a disability must be able to perform the 'essential functions' of a job (whether with or without reasonable adjustment) in order to gain the protection of the statute. However, their Lordships in *Archibald v Fife Council* also held that the DDA 1995, to the extent that the provisions of the Act required it, permitted and sometimes obliged employers to treat persons with disabilities more favorably than others. This may even require transferring them to a higher level position without the need for a competitive interview if that would remove the disadvantage the disabled person would otherwise face, and, in appropriate cases, creating a new post in substitution for an existing post.<sup>283</sup> Section 13 prohibition of direct discrimination in the Equality Act 2010 provide that there will be no issue of direct disability discrimination simply because, where the discrimination is against a person who is not disabled, the result of the direct discrimination is that a person with a disability is treated more favourably.<sup>284</sup> In other words, the Act goes beyond providing for equal treatment for persons with disabilities and allows for positive discrimination in favour of this group of persons.

### **2.1.2 The 'Interested Disabled Person'**

According to the Equality Act 2010, the duty to make reasonable adjustment in the employment context is only triggered when the 'interested disabled person' is put at a substantial disadvantage by some aspects of the employer's operations.<sup>285</sup> In other words, the duty in the employment context is reactive in nature, simply requiring duty-bearers to take reasonable steps to accommodate the needs of a particular person with a disability with whom they are confronted. The 'interested disabled person' is, in relation to a provision, criterion, or practice for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant

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<sup>283</sup> Ibid.

<sup>284</sup> Section 13 (3) Equality Act 2010.

<sup>285</sup> See Schedule 8 Part 2 Equality Act 2010. A similar provision was contained in Section 4A (1), DDA 1995 which referred to 'the disabled person concerned.' Lawson contend that it is because the duty is not triggered until this point that it is considered as reactive rather than anticipatory-see A. Lawson supra no.35 p67.



for that employment,<sup>286</sup> and in any other case, a disabled person who is an applicant for the employment concerned or an employee of the employer concerned.<sup>287</sup> The duty is entirely context-specific: it relates not to the needs of persons in general, but to the requirements of a particular person with a disability so that his or her particular characteristics or circumstances are taken into account.<sup>288</sup>

The focus of the duty to make reasonable adjustment on the individual 'interested disabled person' has a particular resonance with Article 5 of the Framework Directive which provides that 'reasonable accommodation' in the form of 'appropriate measures' shall be taken 'where needed in a particular case. There are certain implications which could be linked to the substantive equality paradigm espoused by the duty to promote disability. First, the reference to the 'interested disabled person' implies that such accommodation will not be required in all cases. employers will remain legally bound to make reasonable adjustment only where a person is at a substantial disadvantage with regard to his or her ability to have access to, participate in, or advance in employment, unless this requirement creates a disproportionate burden on the employer. In the context of the Framework Directive, Recital 17 of the Directive asserts that the Directive only covers those who can perform the 'essential functions' of a job with or without 'reasonable accommodation'. It is probable that a person with a disability who cannot perform the essential functions of the job will not be substantially disadvantaged by the failure to make reasonable adjustment in his or her particular case.<sup>289</sup>

Second, even with financial contributions from the state through the Access to Work Scheme, there may be concerns that the extension by the Equality Act 2010 of the scope of those who could be protected against disability discrimination to include associative discrimination and

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<sup>286</sup> Schedule 8 Part 2 Equality Act 2010.

<sup>287</sup> Ibid.

<sup>288</sup> Disability Rights Commission, DDA 1995 Code of Practice: Employment and Occupation (London, Stationary Office, 2004) para.5.4. See generally K.Monaghan, *Equality Law* (Oxford, OUP 2007) p.375. See also A. Lawson, *supra* no. 42.p66. K.Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' December 2003 Vol.32 No. 4 *ILJ* .pp253-273.

<sup>289</sup> *Bruce v Chamberlain*, *Bruce v Chamberlain* [2004] EWCA Civ 1047.

discrimination by perception, will increase the costs on employers of making reasonable adjustment as many more persons would be defined as disabled.<sup>290</sup> This may cause some practical difficulties, given the range of access issues to be addressed to meet the needs of many more persons with disabilities. the focus of the duty on the ‘interested disabled person’ operate to ensure that the implementation of reasonable adjustment is infused with some degree of financial limits and that the duty does not become an undue burden on or a disincentive to employers recruiting persons with disabilities. The focus reflects a sensitivity and responsiveness to the particular circumstances not only of the individual with a disability in need of an adjustment but also to the concerns of employers who have to bear the costs of making reasonable adjustments.

Third, the reference to the ‘interested disabled person’ serves to underscore the point that the process of making a reasonable adjustment should be an interactive one between the employer and the individual person with a disability. In the context of Article 5 of the Framework Directive, Professor Quinn has pointed out that the duty is quintessentially individualised, involving the person with a disability in an interactive dialogue with the employer to search for the right kind of adjustment needed in the overall circumstances of the individual. Such a dialogue provides the employee with a disability not only with an appropriate forum to exercise his right to autonomy and self-determination but also to challenge the manner by which he or she is being accommodated.<sup>291</sup>

However, the focus of the duty to make reasonable adjustment on the ‘interested disabled person’ has the potential of undermining the attempts to deliver real and substantive equality for persons with disabilities. First, in most instances, an individual accommodation leaves unchallenged and unaffected the underlying discriminatory policy which resulted in the initial

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<sup>290</sup> Section 13 Equality Act 2010 is capable of being interpreted to include associative discrimination and discrimination by perception. It is significant that Article 21(1) of the EU Charter of Fundamental Rights includes ‘genetic features’ as one of the prohibited grounds. Article 10 of the Council of Europe Convention on Biomedicine specifically bans any form of discrimination on the basis of a persons’ ‘genetic heritage’. see generally the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe Treaty System (CETS) No. 164 (1997).

<sup>291</sup> G. Quinn *supra* no.38.

exclusion<sup>292</sup>. The social model of disability which underpins the positive duties to promote equality sees disability as a group defining characteristic.<sup>293</sup> A social approach, based on the group dimension to disability is therefore necessary in order to realize the full potential of the instrument of reasonable adjustment since it is the social distinction which attaches to impairment, and not the impairment itself which causes discrimination and thus calls for adjustment.<sup>294</sup>

Second, by focusing attention on the impairment of the ‘interested disabled person’, the duty to make reasonable adjustment reinforces the medical model of disability framework of the Equality Act 2010 as is the case with the definition of disability. The duty to make reasonable adjustment focuses attention on the particular disabled person and the effects of his or her impairment by acknowledging their difference, albeit as an essential preliminary to the removal of relevant disabling barriers. This process risks fostering the impression that disabled people are different from the rest of the population and that they are in need of special treatment. There is a risk that provision made by way of reasonable adjustments will be perceived not as a practical manifestation of equality but as the provision of a specialized impairment-related aid, not dissimilar to a wheelchair or a white cane.<sup>295</sup>

### **2.1.3 Making Health Inquiries and the Conduct of an Assessment.**

An issue that was apparently not settled under the DDA, 1995 was whether the DDA reasonable adjustment obligations impose a specific duty in law on employers to carry out an assessment of the needs and circumstances of the ‘disabled person concerned’ once they have become aware of the disability. In *Project Management Institute v Latif*<sup>296</sup>, the EAT highlighted the continuing importance of carrying out a thorough and individualized assessments. In

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<sup>292</sup> L. Waddington and A. Hendricks, ‘The Expanding Concept of Employment and Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation 18, 2002 *International Journal of Comparative Labour Law and Industrial Relations* pp 403-415.

<sup>293</sup> J. Bickenbach, ‘Minority Rights or Universal Participation: supra no.122 pp101-116.

<sup>294</sup> M. Oliver *The Politics of Disablement*. (London: The MacMillan Press Limited 1990).

<sup>295</sup> A. Lawson, supra no. 68 pp258-272.

<sup>296</sup> *Project Management Institute v Latif* (2007) IRLR 579(EAT).

this case, a blind candidate had brought action under section 14 DDA 1995 against *Project Management Institute* (PMI) for failing to make reasonable adjustment on the arrangements for her participation in an exam. In finding PMI liable for failing to make reasonable adjustment, the EAT referred to the Tarbuck case<sup>297</sup> where it was established that though a failure to assess the disabled person's circumstances may not in itself necessarily amount to a breach of the duty such a failure would be unwise and potentially jeopardize the employer's legal position.

In *Mid Staffordshire NHS Trust v Cambridge*<sup>298</sup> it was suggested that a duty to make an assessment is implicit in the reasonable adjustments duties. The EAT stated that A proper assessment of what is required to eliminate the disabled persons disadvantage is a necessary part of the duty since the duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. Though the *Mid Staffordshire* case was heavily criticized as representing a misunderstanding about the nature of the reasonable adjustment duties in general and how compliance is to be determined in particular.<sup>299</sup> It is submitted that the focus of the reasonable adjustment requirement is on the negative impact of factors external to the individual with a disability and not on medical assessments of his or her particular impairment-related limitations. Given the importance of an assessment in removing barriers to the employment of a person with a disability, it is submitted that a substantive equality ideal encapsulated in the statutory duty on equality could have required an organization such as Project Management Institute to carry out a proper impact assessment in consultation with the applicant with a disability to remove any discriminatory elements inherent in its standard practices and policies.<sup>300</sup>

A major concern with the conduct of impact assessments in the context of the duty to make reasonable adjustment is that the inquiry may be too intrusive and burdensome which would be unpleasant to employers and persons with disabilities alike. The Disability Discrimination

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<sup>297</sup> *Tarbuck v Sainsbury's Supermarkets* (2006) IRLR 664(EAT).

<sup>298</sup> *Mid Staffordshire NHS Trust v Cambridge* (2003) IRLR 566 (EAT).

<sup>299</sup> K. Monaghan, *Equality Law*. Supra no. 51 p 385.

<sup>300</sup> *Scottish and Southern Energy v Mackay* (2007) UK EATS/OO75/06/MT; *HM Prison Service v Johnson* (2007) IRLR 951 (EAT); and *Hay v Surrey CC* (2007) EWCA Civ 93.

Act 1995 did not explicitly prevent an employer from making health or disability related enquiries of applicants for a job. The extent to which an employer may lawfully enquire about the disability of a job applicant is now covered by Section 60 Equality Act 2010 which deals with Enquiries about disability and health in work.<sup>301</sup> The section provides that an employer to whom an application for work is made must not ask about the health of the applicant until that applicant has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful candidates to be offered a job when a suitable position arises.<sup>302</sup> However, Section 60 (6) permits an employer to make health inquiries on an applicant with a disability where such inquiries are intended to establish whether the applicant would be able to participate in an assessment to test his or her suitability for the work or to make reasonable adjustments to enable the applicant to participate in the recruitment process.

Disability-related health inquiries may also be made as part of an employer's equality and diversity monitoring process or a positive action program aimed at promoting the employment of persons with disabilities. The section also allows health-related questions to be asked where they are deemed necessary in the context of national security vetting. It is significant that the Equality Act 2010 permits an employer to make disability-related health inquiries in order to establish whether an applicant with a disability would be able to perform the intrinsic functions of a job, with the relevant reasonable adjustments in place.<sup>303</sup> The implication here is that there will be no issue of disability discrimination if a person with a disability, even after reasonable adjustments are made in their favour, would be incapable of performing the 'intrinsic' functions of a job for reasons unconnected with their disability.<sup>304</sup>

The reference to 'intrinsic' functions could be linked to the notion of 'essential' functions in the Framework Directive, underscoring the point made by Professor Quinn that 'the employer will need to identify carefully the truly 'essential functions' of a given job and to distinguish

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<sup>301</sup> S60, Part 5 of the Equality Act 2010(which deals with Work).

<sup>302</sup> S60 (1) (a) and (b) Equality Act 2010.

<sup>303</sup> Section 60(6) (b), Equality Act 2010.

<sup>304</sup> *Bruce v Chamberlain*, *Bruce v Chamberlain* [2004] EWCA Civ 1047.

them from marginal functions. Obviously, if an employer over-conflates the 'essential functions' of a job in order deliberately to screen a person with a disability out or if such over-conflation has that result, then the employer is guilty of at least indirect discrimination.<sup>305</sup> Another important point with regard to the issue of health inquiries under the Equality Act 2010 which could potentially impact on the ability of persons with disabilities to enter into and stay in employment is the fact that an employer may conduct a health inquiry to enable him to identify suitable candidates for a job where there is a genuine occupational requirement for the person to be disabled.<sup>306</sup> This provision of the Act could be compared to Article 4(1) of the Framework Directive which allows employers to discriminate on the grounds of disability where 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement'.

The need to scrutinize carefully any negative invocation of the 'genuine occupational' requirement, especially within the context of the employer's duty to make reasonable adjustments and the effect this might have on the ability of the applicant with a disability to carry out the relevant job is illustrated by the case of *Paul v National Probation Service*.<sup>307</sup> In that case, a position was offered to Mr. Paul subject to his passing an occupational health assessment. The offer was withdrawn when the employer received a report from its occupational health officer stating that Mr. Paul's history of depression rendered him unfit for the post. That report had been based on a letter from Mr. Paul's general practitioner, who had not treated him for the condition and did not know him well. The employer took no steps to investigate its accuracy (by, for instance, insisting that the occupational health officer should interview Mr. Paul or seek advice from his psychiatric consultant). Neither did it consider adjustments (such as lengthening his induction period or giving him additional mentoring support) that might have been made in order to reduce the stress that the post might otherwise have placed on Mr. Paul. The employer was therefore held to have failed to comply with its duty to make reasonable adjustments.

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<sup>305</sup> G. Quinn, *supra* no. 38, p.264.

<sup>306</sup> Equality Act 2010 Section 60(6) (e).

<sup>307</sup> [2004] IRLR 190.

#### 2.1.4 The Requirement of Reasonableness

The extent of the adjustments which an employer is required to make under the reasonable adjustment duty is subject to a reasonable test. Thus, in the absence of a defense of justification, the failure of an employer to discharge a duty to make reasonable adjustment can be justified only on the basis of its reasonableness.<sup>308</sup> The Equality Act 2010 does not provide a definition of what constitutes 'reasonable' or a detailed list of 'reasonable' 'steps' of adjustments.<sup>309</sup>

However, the DDA 1995 as well as the relevant Code of Practice provided guidance to the meaning of reasonableness with regard to the duty to make reasonable adjustment in the employment context.<sup>310</sup> According to section 18B (1) DDA 1995, in establishing the reasonableness of the measures taken by an employer regard must be had to the extent to which the step in question would remove or avoid the substantial disadvantage which caused the duty to arise. In assessing the extent to which a particular adjustment would remove or avoid a relevant disadvantage, regard is obviously to be had to the question of its effectiveness. The concept of reasonableness is an objective one, to be assessed not by reference to the subjective opinion or belief of an employer but by reference to objectively demonstrable facts and circumstances.<sup>311</sup>

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<sup>308</sup> As originally enacted, the DDA 1995 provided for a justification defence for a failure to make reasonable adjustment but this defence was removed by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003 1673). However, even with the justification defence, the judicial consensus was that justification in reasonable adjustments cases would be of very narrow scope indeed *Collins v National Theatre* (2004) IRLR 395 (CA) *O'Hanlon v Commissioners Revenue and Customs* (2006) IRLR 840 (EAT); and *Smith v Churchill Stairlifts* (2005) EWCA Civ 1220.

<sup>309</sup> Section 20(6) provides that the provision of information in accessible format will constitute a reasonable step.

<sup>310</sup> DRC, DDA 1995 Code of Practice: Employment and Occupation The Equality Act 2010 like the DDA 1995 employed the threshold of 'substantial' disadvantage with regards to the duty to make reasonable adjustment. However, unlike the DDA 1995 where the threshold of substantial disadvantage applied only in their employment field, the substantial disadvantage in the Equality Act 2010 applies to both the employment field and in the provision of services.

<sup>311</sup> The judicial consensus was that justification in reasonable adjustments cases would be of very narrow scope indeed; *Collins v National Theatre* (2004) IRLR 395 (CA) *O'Hanlon v Commissioners Revenue and Customs* (2006) IRLR 840 (EAT); and *Smith v Churchill Stairlifts* (2005) EWCA Civ 1220. See also DRC Code of Practice: Employment and Occupation (2004 DRC) The duty to make reasonable adjustment is not a positive measure left to the discretion of an employer but a statutory duty whose failure constitutes unlawful discrimination.

In this respect, a step which will totally remove or avoid the relevant disadvantage is likely to be judged to be a reasonable one as long as it is not burdensome. However, the fact that there is some uncertainty about the likely effectiveness of the proposed measure will not necessarily prevent it being regarded as a reasonable measure and thereby absolve the employer from the need to take it. Furthermore, the fact that implementing a particular measure by an employer will result in a disabled person being treated more favorably than others does not necessarily render the measure unreasonable if it is required in order to remove the relevant disadvantage.<sup>312</sup>

Another important factor to be taken into account in assessing reasonableness is the practicability of the particular measure taken by the employer in removing the disadvantage to the disabled person concerned.<sup>313</sup> Practicability within the context of the reasonableness test is not limited to considerations of cost as it recognizes that, in some instances, factors not directly related to expenditure may make it difficult for an employer to carry out a particular adjustment.<sup>314</sup>

The size of an employer's resources is also important in establishing the reasonableness of any measure undertaken by him in fulfillment of the duty to make reasonable adjustment. This is because, in determining whether or not performance of the duty constitutes a 'burden', regard needs to be had for the financial and other costs, the possible disruption of the employer's activities, and the extent of the employer's financial resources and the availability of any financial or other help.<sup>315</sup>

## **2.2 Discrimination in the Provision of Services**

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<sup>312</sup> Archibald v Fife Council (2004) UKHL 32; (2004)IRLR

<sup>313</sup> DDA 1995 Section 18B (1) (b).

<sup>314</sup> DRC DDA 1995 Code of Practice: Employment and Occupation, (London Stationery Office 2004). Para 5.30.

<sup>315</sup> See generally DDA 1995 section 18B (1). With regard to the availability of financial help to the employer through the Access to Work Scheme, see generally Shaw and Co. Solicitors v Atkins (2009) UKEAT 0224-08-1102. See also A. Lawson, *supra* no. 42. P. 84 where the availability of Access to Work funding is identified as a major contributor to the success of the reasonable adjustment duty under the DDA 1995.



### **2.2.1 General Prohibition of Discrimination**

Discrimination in the provision of goods, facilities and services is outlawed by section 29, in part 3 Equality Act 2010. According to the section, discrimination in the provision of goods and services will occur when:

There is a failure or refusal to provide the disabled member of the public with services which are otherwise provided to members of the public.<sup>316</sup>

There is a failure to comply with the duty to make reasonable adjustment imposed on the service provider by virtue of section 29(7) of the Equality Act 2010.

There is discrimination in the quality, manner or terms of service provided to disabled persons.<sup>317</sup> A provider of services also discriminates if he subjects the disabled person to any other detriment in the course of providing the service.<sup>318</sup>

The Act also prohibits harassment<sup>319</sup> and victimization<sup>320</sup> in the provision of goods and services. Discrimination in the context of the provision of services includes direct discrimination, indirect discrimination, and discrimination arising from disability as well as the duty to make reasonable adjustment. The first three types of discrimination in this context are similar to that in the employment and related field. The focus here will therefore be on discrimination resulting from the failure to comply with the duty to make reasonable adjustment.

### **2.2.2 Group Disadvantage Theory**

A central element of the s20 Equality Act 2010, reasonable adjustment duties in the context of the provision of goods and services is the fact that the duties are owed to

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<sup>316</sup> Equality Act 2010 Section 29(1)

<sup>317</sup> Equality Act 2010 Section 31 (7).

<sup>318</sup> Equality Act 2010 Section 29(2)(a),(b) and (c)

<sup>319</sup> Equality Act 2010 Section 29 (3)

<sup>320</sup> Equality Act 2010 Section 29 (4)

persons with disabilities at large, irrespective of their personal characteristics.<sup>321</sup> This contrasts sharply with the individually owed duties arising in the employment and related field. The duties do not require the existence or presence of a specific person with a disability in order to be triggered. In fact, it was held with respect to the s21 DDA 1995 duty that no reasonable adjustment duty will arise unless it can be shown that the challenged policy, practice, procedure or feature caused the required level of group disadvantage.<sup>322</sup> However, the fact that the duty is owed to persons with disabilities as a group does not preclude the fact that the duty-bearers will, in addition, be required to react to the circumstances of a particular person with a disability by implementing reasonable adjustments to accommodate his or her specific needs.<sup>323</sup> This will be the case where, as in education it is important to tailor adjustments to the specific needs of the individual with a disability through assessments of individual needs.<sup>324</sup>

The s20 EA 2010 duty combined both the individual and group dimension of the duty to make reasonable adjustment. While the imposition of these duties does not depend on the existence of a specific person with a disability wishing to use the relevant service, their enforcement is dependent on the appearance of such an individual. According to S21 (3) EA 2010, the section 20 duties are enforceable, not in their own right, but only as part of a discrimination claim<sup>325</sup> which must be brought by a disabled individual who, as result of a service provider's failure to comply with a reasonable adjustment duty, has been put at a substantial disadvantage in comparison with persons who are not disabled with regard to access to and use of the service in question.<sup>326</sup> This is an important difference to the requirements of the positive duty to promote equality. Although the positive duty requires

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<sup>321</sup> According to Section 31 para 2(2) of Schedule 2 Equality Act 2010, the duty to make reasonable adjustment in the provision of services applies to disabled persons generally. For the position under the DDA 1995, see generally, A. Lawson, p.96; Also See generally K. Monaghan, *Blackstone's Guide to the Disability Discrimination Legislation* ((OUP 2005) pp158, 296-314.

<sup>322</sup> *Roads v Central Trains* [2004] EWCA Civ 1541.

<sup>323</sup> A Lawson, *supra* no.68 p110.

<sup>324</sup> DRC, DDA 1995 Code of Practice: Rights of Access-Services to the Public, Public Authority Functions, Private Clubs and Premises (London Stationery Office 2006). Para6.21.

<sup>325</sup> Section 19 DDA.

<sup>326</sup> Section 21 Equality Act 2010.

positive measures designed to facilitate disability equality, breach of it will not itself constitute unlawful discrimination.<sup>327</sup>

The fact that persons with disabilities do not constitute a homogeneous group may pose some difficulties with regard to the group disadvantage element of the duty to make reasonable adjustment. What may constitute a disadvantage to a visually impaired customer may not necessarily have the same effect on a wheelchair user.<sup>328</sup> In this respect, *Sedley LJ* stated in *Roads v Central Trains Ltd*<sup>329</sup> that, in establishing group disadvantage, it is not necessary to show that all or most persons with a disability were disadvantaged. It suffices that the claimant demonstrates that there is a significant impact on a particular class of persons with a disability such as wheelchair users or blind persons. This aspect of the group disadvantage requirement is very important in the delivery of social services as it reflects the flexibility of the law to meet the needs of persons with disabilities. A linked effect is the fact that group disadvantage is not necessarily established by way of statistical evidence.<sup>330</sup>

This is in contrast to the traditional approach to establishing disparate impact in indirect discrimination and reflects a pragmatic approach which ensures that establishing group disadvantage will generally not be a complex and expensive task requiring the collection and analysis of bundles of statistical evidence capable of discouraging a potential claimant.<sup>331</sup> The significance of this point is reinforced by the

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<sup>327</sup> Section 149 Equality Act 2010 duty is enforceable only by way of judicial review and by the Commission for Equality and Human Rights (CEHR).

<sup>328</sup> Section 6(3) (a) and (b) Equality Act 2010 defines a disabled person with reference to a particular disability and persons who have the same disability. For an analysis of how different impairments could impact on anti-discrimination, see generally J. E. Bickenbach, 'Minority Rights or Universal Participation: the Politics of Disablement' in M. Jones and L.A. Basser Marks (eds), *Disability, Diversity and legal Change* (Kluwer Law International 1999) pp101-116; See also S. Fredman, 'Disability Equality: A Change to the Existing Anti-Discrimination Paradigm?' in A. Lawson and C. Gooding(eds) *Disability Rights in Europe: From Theory to Practice*. (Hart Publishing 2005) pg 199-218; C. O'Cinneide, 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in A. Lawson and C. Gooding, *Disability Rights in Europe: From Theory to Practice*. (Hart Publishers 2005) p220.

<sup>329</sup> [2004]EWCA Civ 1540, para 26.

<sup>330</sup> *Ibid*

<sup>331</sup> A Lawson, *supra* no. 68 pp97-98.

fact that, *even* though the prohibition of indirect discrimination under Section 19, Equality Act 2010 covers both disparate impact as well as ‘intentional discrimination through the guise of apparently neutral provisions’, most indirect discrimination in the context of disability would be unintentional, that is unmotivated indirect impact which would generally not require the claimant to prove a discriminatory intent.<sup>332</sup>

However, the requirement of claimant disadvantage in the duty could have profound effects on the promotion of equality for persons with disabilities. The claimant disadvantage requirement renders it impossible for anticipatory reasonable adjustment claims to be brought until an individual disadvantage is willing to bring a case. The effect here is that a particular practice or procedure which discriminates against persons with disabilities can be challenged only if there is a willing claimant who has suffered a disadvantage. This is the case even where it is obvious that the practice or procedure operates to exclude or disadvantage a significant number of persons with disabilities. In fact, it may even be the case that a particular practice or procedure itself deters members of particular groups from applying for a particular job or from using a particular service. This may pose a particular difficulty in finding a disadvantaged claimant. Removing the need to identify disadvantaged litigants willing to litigate would go a long way to strengthen the group dimension of reasonable adjustment claims.

### **2.2.3 Anticipatory Duty as Substantive Equality**

The Section 20 Equality Act 2010 duties, like the preceding s21 DDA 1995 duties are anticipatory in nature.<sup>333</sup> The duties require service providers to plan in advance to ensure that their services are reasonably accessible to persons with disabilities. It obliges service providers to ensure that they have considered and taken steps to ensure the accessibility of their services in advance of persons with disabilities who may want to use such services. It requires service providers to scrutinize their physical features, provision,

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<sup>332</sup> For details on the prohibition of direct and indirect discrimination under the Framework Directive, see generally G. Quinn, *supra* no.38 pp231-277.

<sup>333</sup> The reference in Schedule 2 Equality Act 2010 to ‘disabled persons’ could be contrasted to the reference in the employment context to the interested ‘disabled person’ and provides the reason why the duties are termed anticipatory.

criteria and practices in order to identify the disproportionate disadvantage they may cause to persons with disabilities. Scrutiny will require that consideration be given to how potential ‘barriers’ arising from problematic physical features, provisions, criteria or practices might be removed, altered or avoided. It would involve carrying out a thorough impact assessment of an organization’s provisions, criteria and practices.<sup>334</sup>

This anticipatory element of the duty to make reasonable adjustment is immensely significant to equality for persons with disabilities as it reflects a substantive and proactive concept of equality. It is a major driver in encouraging service providers to think in advance about removing barriers experienced by persons with disabilities. It operates to deny service providers of an excuse to treat persons with disabilities ‘less favorably’ on the basis that, because they did not know in advance that an adjustment was required, it was not reasonable to provide one. In addition, the duties create a continuing obligation so that adjustments made will not discharge them once and for all.<sup>335</sup> Instead, compliance must be kept under continuing review.<sup>336</sup> The anticipatory nature of the duty to make reasonable adjustment is particularly important because it recognises that equality for persons with disabilities is not a static concept but one that is dynamic and cannot be achieved in a single instance<sup>337</sup> It is particularly significant with regard to the provision of services to persons with disabilities as the introduction of new systems and technologies may create both fresh obstacles for this group of persons and new and innovative means of overcoming them.

#### **2.2.4 The Threshold of Substantial Disadvantage**

The duty to make reasonable adjustment in the provision of services under the Equality Act 2010 arise where it could be established that the existence of a

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<sup>334</sup> See generally, How over view and Scrutiny can help Local Authorities meet their Equality Duties *The Centre for Public Scrutiny*. September 2007. Available at [www.Cfps.org.UK](http://www.Cfps.org.UK); See also A Lawson, supra no.42 .pg67.

<sup>335</sup> DRC, DDA 1995 Code of Practice: Rights of Access-Goods, Facilities, Services and Premises (London Stationary Office, 2006) Para 4.19 and Para 6.22.

<sup>336</sup> Ibid Para4.19; Also K. Monaghan, supra no.107 p.163.

<sup>337</sup> S. Fredman, ‘Disability Equality: A Challenge to the Existing Anti- Discrimination Paradigm?’ supra no.8 pp 199-218.

provision, criterion or practice, or physical feature or the failure to provide an auxiliary aid or service puts a person with a disability at a substantial disadvantage in comparison to persons who are not disabled.<sup>338</sup> This is a significant departure from the threshold of 'impossible or unreasonably difficult' under the DDA 1995 which was considered as a potentially high one to meet. In fact, the DDA standard was an important limitation to the ability of the s21 duty to deliver substantive equality to persons with a disability. In *Appleby v Department for Works and Pensions (DWP)*<sup>339</sup> the issue concerned the queuing system adopted by a benefits agency when its standard procedure of indicating whose turn it was through a visual display monitor and audible *Tannoy* system were out of action. The district judge held that the trigger of 'impossible or unreasonably difficult' had not been met despite the fact that the visual display unit in the DWP office was out of order which made it impossible for a hard to hear person who had attended the office to apply for a National Insurance number to know when it was his time to move to the office. The court appeared to imply that the use of a service will not be held to be 'impossible or unreasonably difficult' where a person with a disability is able to negotiate the disputed barrier through the assistance of other members of the public. This decision could be compared to *Baggley v Kingston-upon Hull*<sup>340</sup> where it was also held that the threshold of 'unreasonably difficult' had not been reached despite the fact that the claimant, a wheel chair user who was seated at the back of a concert hall was unable to see the performer on stage because other spectators were standing and blocking his view.

The decisions in *Appleby*<sup>341</sup> and *Baggley*<sup>342</sup> may be considered as unfortunate as they undermine the need for independence, autonomy and self dignity for persons with a disability whose ability to participate in the normal life of the community must not be made dependent on the benevolence of the non disabled persons.<sup>343</sup> However, the situation may be different in the light of the two Court of Appeal decisions in *Ross v*

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<sup>338</sup> Section 20 (1) and (2) Equality Act 2010.

<sup>339</sup> Lambeth County Court, Claim No LB001649.

<sup>340</sup> Kingston upon Hull County Court, Claim No. KH101929.

<sup>341</sup> Lambeth County Court, Claim No LB001649.

<sup>342</sup> Kingston upon Hull County Court, Claim No. KH101929

<sup>343</sup> See generally, C. Gooding and C. Casserley, 'Open for All? Disability Discrimination Laws in Europe Relating to Goods and Services' in A. Lawson and C. Gooding, (eds), *Disability Rights in Europe* (Hart Publishing 2005) pp 135-162.

*Ryanair and Stansted Airport*<sup>344</sup> and *Roads v Central Trains*.<sup>345</sup> Based on their individual facts, the Court of Appeal was inclined in both of these cases to hold that the required level of difficulty had been met. The adoption of the threshold of substantial disadvantage will not only ensure consistency across the reasonable adjustment duty but will also mean a lower threshold for triggering the duty. However, the position may be much improved in terms of the attainment of substantive equality for persons with a disability by the positive duty to promote equality as it imposes an obligation on the duty bearer to remove all barriers that may prevent persons with a disability from using their services, whether or not the barrier is unreasonably difficult or is capable of causing substantial difficulty to this group of persons or to any member of the group.

### **2.2.5 Discharging the Duty**

Like the duty under the DDA 1995, the s20 EA 2010 duty to make reasonable adjustment is subject to a reasonableness test. Thus, within the context of the provision of goods and services the question whether or not services are capable of putting persons with a disability at a substantial disadvantage is determined objectively. The EA does not provide any examples of what might constitute reasonable adjustment in the provision of goods and services. However, the DRC Code of Practice<sup>346</sup> provides that, in determining the reasonableness of an adjustment, account should be taken of factors such as;

The extent to which it is practicable for the service provider to take the steps.

The financial and other costs of making the adjustment.

The extent of any disruption which taking the steps would cause.

The extent of the service provider's financial and other resources

The extent of any resources already spent on making adjustments

And the availability of financial or other assistance.

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<sup>344</sup> *Ross v Ryanair and Stansted Airport Ltd* (2004) EWCA Civ 1751.

<sup>345</sup> *Roads v Central Trains Ltd* CA (2004) EWCA Civ 1541.

<sup>346</sup> DRC, DDA 1995 Code of Practice: Rights of Access-Services to the Public, Public Authority Functions, Private Clubs and Premises (London Stationery Office 2006) Para 6.25.

In establishing the reasonableness of an adjustment, service providers are directed to ask themselves whether the difficulties would be considered unreasonable by other people if they had to endure them. In this respect, regard would have to be taken of factors such as inconvenience, effort, discomfort, anxiety, or loss of dignity.

### **2.3 Discrimination by Public Authorities**

Discrimination against or the victimization and harassment of persons with disabilities by public authorities in the discharge of their functions is outlawed by section 29(6) Equality Act 2010. The Act also imposes a duty to make reasonable adjustment for persons with disabilities on public authorities in the discharge of their functions. In fact, Section 29(7) places Public authorities under similar reasonable adjustment duty to that imposed on providers of services by section 29. Discrimination arising from the failure to make reasonable adjustment cannot be justified.

The position of the EA2010 with regard to the ability of public authorities to justify a failure to comply with a duty to make reasonable adjustment could be contrasted with the position under the DDA 1995 and marks a fundamental advancement in the protection afforded persons with a disability by the duty to make reasonable adjustment. By virtue of s 21B (e) of the DDA 1995, a public authority discriminates against a disabled person if it fails, without justification to comply with the duty to make reasonable adjustment and It is for the public authority to show that its failure to comply with the duty is justified. The DDA provided for two forms of justifications with regard to a public authority's failure to comply with the duty to make reasonable adjustment; the subjective and the objective justifications. The subjective defense or 'specific believe justification'<sup>347</sup> provided that; first, the Public authority must show that, in their opinion, one or more of a number of specified conditions was satisfied and Second, that it was reasonable, in all the circumstances of the case, for them to hold that opinion.

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<sup>347</sup> DDA 1995 Section 21D (3).



The specific believe justification defense thus consisted of two elements; the first which is subjective in nature required a demonstration of a belief in the existence of one or more of the specified conditions. The second element which is objective in nature required a demonstration that belief was reasonably held. The focus here is not on the reasonableness of the belief but the reasonableness of the holding of that belief by the particular Public authority in the particular circumstances of the case. The specified conditions<sup>348</sup> which were applicable only with regard to the ‘specific believe’ justification envisage certain reasons which may have caused the public authority not to comply with the duty to make reasonable adjustment. The specified conditions were;

- the failure to comply with the duty was necessary in order not to endanger the health or safety of any person, including that of the person with a disability. This defense has been maintained by the EA 2010 with regard to providers of blood services.<sup>349</sup>
- that the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent and that the failure to comply with the duty is reasonable in the particular case;
- that the non-compliance with the duty is necessary for the protection of rights and freedoms of other persons. This was equated to disability related discrimination as it amounted to a less favourable treatment of an individual with a disability.<sup>350</sup> The EA 2010 provides that a service provider will not be liable if he can show that the failure to comply with the duty is necessary for the public good.<sup>351</sup>

As is the case under the EA 2010, the discharge of the duty to make reasonable adjustment by public authorities under the DDA 1995 was subject to cost considerations. Section 21D (4)(c) provided that a failure to make reasonable adjustment will be justified where, in the opinion of the public authority treating the

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<sup>348</sup> DDA 1995 Section 21D (4).

<sup>349</sup> Part 3 of Schedule 3, para.14 (1) (b) and (c) Equality Act 2010.

<sup>350</sup> Disability Discrimination (Service Providers and Public Authorities Carrying Out Functions) Regulations 2005 SI 2005/2901, Reg 3(made under DDA1995, Section 21D (7) (A).

<sup>351</sup> Part 4 of Schedule 3 Para. 16(3) Equality Act 2010.

disabled person equally favorably would, in the particular case involve substantial extra costs and, having regard to resources, the extra costs in that particular case would be too great.

Section 21D (5) DDA 1995 afforded a further objective justification to the failure to comply with the duty to make reasonable adjustment which is applicable to public authorities. Under the subsection, a public authority could justify a failure to comply with the duty to make reasonable adjustment in the provision of goods and services on the basis that such a failure constitutes a proportionate means of achieving a legitimate aim. This objective defense which was aimed at protecting public authorities from liability in the discharge of their public functions had three essential elements;

first, the public authority must demonstrate that there is a pressing policy need that supports the aim which the treatment is designed to achieve; second, the aim must be a 'legitimate' aim and the authority's action must be causally related to achieving that aim; third, there was no other way to achieve the aim that had a less detrimental impact on the rights of persons with disabilities.<sup>352</sup>

The Equality Act 2010 has now abolished the both forms of defences and the only basis upon which a public authority could attempt to justify a failure to make adjustment for persons with a disability is on the ground of its unreasonableness. However, in deciding whether a failure to make an adjustment is reasonable or not, the courts are likely to apply a proportionality test or adopt a contextual approach by weighing two elements in the balance: on one side the effectiveness of the accommodation in enabling the disabled person to access employment, and on the other side the financial cost of the adjustment for the employer. A key consideration in this balancing act will not only be the extent to which a particular adjustment could enable more persons with a disability to enter and stay in the employer's employment but also the extent to which the employer is discharging any positive duty imposed on him or her such as the statutory duty to promote disability equality.

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<sup>352</sup> DDA 1995 (2005 Amendment); see also DRC, DDA 1995 Code of Practice: Rights of Access-Services to the Public, Public Authorities Functions, Private Clubs and Premises (London Stationery Office 2006) para 11.56.

### 3.0 Justification Defence In Disability Discrimination

The extent to which the rights of persons with disabilities against discrimination are protected under the law depends in part on the extent to which acts of discrimination could be justified in law.

#### 3.1 Knowledge of the Claimant's Disability

Knowledge of a claimant's disability by the defendant is a central element in establishing liability for disability discrimination under the Equality Act 2010. First, the duty to make reasonable adjustment in the employment context is highly individualised and reactive and knowledge that the interested disabled person has a disability is required for the duty to be triggered<sup>353</sup> There is no obligation placed upon the employer if the employer does not know, or could not have reasonably been expected to know, that the applicant or employee had a disability. Second, according to s15(2) EA 2010, there will be no discrimination arising from a person's disability if the alleged discriminator shows that he did not know, and could not reasonably have been expected to know, that the person with a disability had the disability.

The employer's knowledge of the disabled person's disability was also required under the DDA 1995. In order to establish that a reason is disability-related under the DDA 1995, it was necessary to show that it was indeed a reason for the less favourable treatment in question. In other words, the court had to be satisfied that the claimant's disability was in fact a reason which must have been present in the mind of the defendant. In *Taylor v OCS Group Ltd.*<sup>354</sup> The Court of Appeal held that, in order to establish disability-related discrimination, the claimant's disability must have been present in the mind of the employer, whether consciously or subconsciously as a disability-related reason for the less favourable treatment. In this case, the employer had failed to provide the relevant sign language support to a deaf employee who had been dismissed for accessing the private correspondence of a colleague and who therefore was unable to participate effectively in

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<sup>353</sup>Schedule 8 Part 3 Equality Act 2010. A similar provision was contained in the DDA 1995, Section 4A (3).

<sup>354</sup> [2006]EWCA Civ 702, [2006] IRLR 613.

the associated disciplinary process. Based on the facts of the case, the Court of Appeal found that no reason related to Mr. Taylor's disability had been present in his employer's mind when the decision was made to dismiss him. consequently, no disability-related discrimination could be established.

In holding that no duty to make reasonable adjustment had arisen in *Davies v Toys R'Us*,<sup>355</sup> the Court of Appeal considered as crucial the fact that on several occasions, the employer had asked the disabled employee whether he was experiencing any difficulties connected with his impairment and he had replied in the negative. However, in *Ridout v TC Group*,<sup>356</sup> the job applicant had informed the employer before her interview that she had medically controlled photosensitive epilepsy but the employer did not inquire as to the implications of this for the arrangements it would need to make in order to ensure that the applicant was not placed at a substantial disadvantage. The Employment Appeal Tribunal held that the duty to make reasonable adjustment did not apply as the applicant had not been sufficiently explicit as to the nature of her disability and the steps the employer should have taken to overcome any disadvantage resulting from it. The decision in *Ridout*<sup>357</sup> is questionable. Even though the applicant had not been explicit on her disability, she did in fact mention that she had a medical condition that could disadvantage her. Yet, the employer, unlike in *Davis* made no attempt to inquire whether the disabled person might be experiencing difficulties as a result of the employer's arrangements or physical features. As Lawson<sup>358</sup> has noted the decision in *Ridout* 'appears to have allowed the concern to avoid intrusive inquiries to go a considerable way towards curtailing the scope of the reasonable adjustments duty, thereby undermining potentially the purpose of the legislation.'

The judicial reasoning in the Taylor case was adopted by the House of Lords in *Lewisham v Malcolm*<sup>359</sup> when it stated that, in determining whether a defendant is guilty of disability-

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<sup>355</sup> *Davis v Toys 'R' Us* [2008] ET/1900286/98.

<sup>356</sup> [1998] IRLR 628 (EAT).

<sup>357</sup> *Ibid.*

<sup>358</sup> A. Lawson, *supra* no. 68 .p78.

<sup>359</sup> *Lewisham v Malcolm* [2008] UKHL 43, [2008] 3 WLR 194.

related discrimination, courts must ascertain 'the real reason for the treatment, which is the reason which operates on the mind of the alleged discriminator' and which 'may not be the reason given' or 'the only reason'. By deciding that the defendant must have been aware that the person in question was disabled and that the reason was related to their disability, the *Taylor and Lewisham* cases established a subjective test which had the potential of watering down the strength of the protection afforded by the law by creating an escape route from liability for *credible and honest yet ignorant or obtuse employers who fail to recognize or acknowledge the obvious*.....<sup>360</sup> Prior to the decision in *Lewisham*, it was generally accepted that the link between the reason for the relevant treatment and the disability of the claimant was to be assessed objectively without reference to the defendant's knowledge.<sup>361</sup> This position was supported by the Employment Code of Practice which provided that The reason for any less favourable treatment may well relate to the disability even if the employer does not have knowledge of the disability.<sup>362</sup>

The *Lewisham* case therefore firmly established in law under the DDA the proposition *that* the knowledge of the defendant had a vital role to play in establishing that a reason was disability-related. Unless the defendant knew, or ought to have known, of the claimant's physical or mental impairment, the reason for the treatment could not be regarded as disability-related. The Equality Act 2010 has adopted the subjective approach espoused in *Lewisham* within the context of a reasonableness test. While the practical effect of the knowledge requirement may be to make persons with a disability to be more open and forthright with their disability or impairment, it must be noted that anti-discrimination measures should be founded on the understanding that substantive equality for persons with a disability is not a dispensation that must be booked in advance. The anticipatory nature of the positive duty to promote equality should require employers and service providers to think in advance of how their policies and practices may disadvantage persons with a disability and to remove all such obstacles without necessarily waiting to become aware of the individual's disability. In fact, the requirement of the employer's knowledge of the disabled person's

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<sup>360</sup> *Heinz Co Ltd v Kenrick* [2000] IRLR 144(EAT), Lindsay P.

<sup>361</sup> *Ibid.* See also *Hammersmith and Fulham v Farnsworth* [2000] IRLR 691, *O'Neil v Symm & Co* [1998] ICR 481(EAT).

<sup>362</sup> DRC DDA 1995 Code of Practice: Employment and Occupation, (London Stationery Office 2004). para 4.31.

disability will continue to place a significant check on the potential of both the disability-related discrimination provisions and the reasonable adjustment duty of the EA 2010 in fighting discrimination against persons with a disability.<sup>363</sup>

### **3.2 The Requirement of ‘Material and Substantial’ Justification.**

According to s15 (1) (b) EA, 2010, a defendant will not be liable for discrimination arising from a person’s disability if it could be shown that the unfavourable treatment was a proportional means of achieving a legitimate aim. This defence also apply to indirect discrimination under section 19 of the Equality Act 2010.

The position under the Equality Act 2010 could be contrasted with the position under the DDA, 1995 where it was firmly established by the Court of Appeal in *Jones v The Post Office*<sup>364</sup> that any justification under section 3A (1) (b) regarding disability-related discrimination had to be material to the circumstances of the case and substantial.<sup>365</sup> material required the existence of a reasonably strong connection between the employer’s reason for treating the person with a disability less favourably and the facts of the particular case. Substantial was held to mean that the reason must simply be more than trivial or minor.

A logical implication of the Jones justification is that a reason could be regarded as material and substantial even if such a reason was based on a misunderstanding which a reasonable employer would not have formed. Its practical effect, however, is that the justification defense would succeed as long as the reason could be shown to fall within the range of reasonable responses to the known facts.<sup>366</sup> However, there were situations when the employer could still not be able to justify the treatment, even if there were material and substantial justifications for the less favourable treatment. First, a reason could not be held to be reasonable if it was one which no reasonable employer could have accepted. Second, the

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<sup>363</sup> A Lawson, supra no.68 p 76.

<sup>364</sup> [2001] EWCA Civ 558, [2001] ICR 805.

<sup>365</sup> Section 3A (3) DDA 1995.

<sup>366</sup> *Jones v The Post Office* [2001] EWCA Civ 558, [2001] ICR 805.

employer could not justify a less favourable treatment if he had failed in the duty to make reasonable adjustments. In such circumstances, the employer had to show that the material and substantial circumstances would have applied even if the adjustments had been made.

The Jones interpretation was criticised for setting the threshold of the justification defense for disability-related discrimination unacceptably low as it did not require the reason for the less favourable treatment to be correct or convincing. It simply required it to be material to the circumstances of the case and substantial.<sup>367</sup> This fact, coupled with the decision in the Lewisham case regarding the issue of the appropriate comparator threatened a complete erosion of any protection which the disability-related discrimination provisions of the DDA afforded to persons with a disability, especially in those areas of the Act where direct discrimination did not apply. The apparent imbalance created by both the *Lewisham and Jones* cases with regard to the protection afforded to persons with a disability against disability-related discrimination appears to have been removed by the Equality Act 2010 which has extended the conventional justification in cases of indirect discrimination to discrimination arising from disability.

### **3.3 A ‘Proportionate Means of Achieving a Legitimate Aim’.**

The requirement by the Equality Act 2010 that a defendant in a claim for indirect discrimination must demonstrate that the alleged act of discrimination was a proportionate means of achieving a legitimate aim is significant with regard to the degree of protection afforded to persons with a disability under the Act. First, even though the provision of reasonable adjustment will answer a charge of indirect discrimination in most instances, there is still the theoretical possibility that indirect discrimination may occur in the context of disability in which the provision of reasonable adjustment will be no solution. In such cases, a public authority would have to rely on the objective justification to indirect discrimination by showing that the discriminating provision, criterion and practice was a legitimate aim pursued proportionately.

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<sup>367</sup> *Surry Police v Marshall* [2002] IRLR 843 (EAT).

Second, the defense appears to be co-extensive with the substantive equality paradigm enunciated by the positive duty to promote equality.<sup>368</sup> In determining whether a policy or practice was a proportionate means of achieving a legitimate aim in a claim for disability-related discrimination, a key consideration will not only be the claimant's position in society in terms of the membership of a disadvantaged group such as persons with a disability but also the extent to which the public body or organization is complying with any duty upon it to promote equality for the relevant group of persons.<sup>369</sup>

In the context of disability, the proportionality test would mean that the courts are likely to take into account the fact that the public body is under a statutory duty to give priority to persons with disabilities on the basis of their disadvantaged position in society or because they have suffered from past discrimination. In other words, a failure to take account of the needs of a disadvantaged group such as persons with disabilities may now amount to discrimination. It may be unjustified to refuse to create an exception to the general norm, even where that norm could be justified as a proportionate means of achieving a legitimate aim. The advancement registered by the positive duty is the fact that it does not only impose a statutory obligation on Public bodies to identify and address unlawful discrimination, whether direct or indirect but most importantly, removes the need for any form of justification. Positive duties are proactive rather than reactive.<sup>370</sup>

Substantive equality authorizes measures that give preference to members of disadvantaged groups. It envisages the promotion of disadvantaged groups so as to achieve a society that adequately reflects the dignity of its members.<sup>371</sup> Since the focus of substantive equality is on groups that are worse-off, the Court will generally be more inclined to uphold policies and practices that promote the position of disadvantaged individuals, and less inclined to uphold those policies and practices that entrenches pre-existing disadvantage. Thus, to the

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<sup>368</sup> S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights pp163 – 190. See also, S. Fredman, 'Equality: A New Generation? *Supra no.9* pp.145-168

<sup>369</sup> See Government's Consultation on Improving Protection from Disability Discrimination Nov 2008 .Available at [www.officefordisability.gov.uk](http://www.officefordisability.gov.uk).

<sup>370</sup> Equality Act 2010 Section 149 (2). See also S. Fredman and S. Spencer, *supra no. 65* pp. 14 – 19;

<sup>371</sup> M. Wesson, 'Equality and Social Rights: *supra no.9* pp748-769.



extent that their Lordships in the *Lewisham* case were prepared to factor the statutory duty to promote disability equality in to their decision, the duty would have operated to ensure that the disadvantaged position in society of the claimant is taken into account when deciding whether or not the Housing Policy of the local authority discriminated against the claimant in the provision of services. The positive duty to promote equality may thus be crucial in dealing with situations of indirect discrimination and in breaking down structural barriers.

## **4 Harassment and Victimisation**

### **4.1 Harassment**

Section 26 of the Equality Act 2010 prohibits harassment on similar terms as the DDA 1995. However, the section includes sexual harassment or conduct of a sexual nature in the workplace.<sup>372</sup> A person subjects a disabled person to harassment if he or she engages in, in relation to the disability, unwanted conduct which has the purpose or effect of

- (a) Violating the disabled person's dignity, or
- (b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for him.<sup>373</sup>

In determining whether a conduct amounts to harassment, the courts would apply a reasonableness test, taking into account all circumstances of the case especially the perception of the disabled person. Thus, although there is a reasonableness test, it is not necessarily an objective test as the view of the disabled person affected by the conduct is important. However, what is important here is the fact that, in determining whether or not a person has been guilty of harassment, courts will be expected to balance competing rights on the facts of each particular case.<sup>374</sup>

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<sup>372</sup> Equality Act 2010, Section 26(2) (a) and (b).

<sup>373</sup> Equality Act 2010 Section 26 (1).

<sup>374</sup> See generally Equality Act 2010, section 26 (4) (a), (b) and (c).

With regard to employment, section 40(1) makes it unlawful for an employer to harass a disabled employee or a disabled job applicant. Also, by virtue of s40(2) of the EA2010, an employer would be vicariously liable for the harassment of an employee in the course of his employment by a third party if the employer failed to take such steps as would have been reasonably practicable to prevent the third party from harassing the employee. However, an employer will not be liable for harassment unless he knows that the employee has been harassed in the course of the employee's employment on at least two other occasions by a third party. In order to establish liability for harassment, it is irrelevant whether the third party alleged to have been responsible for the harassment of the employee is the same or a different person on each occasion.<sup>375</sup>

## **4.2 Victimisation**

Unlike the DDA 1995 which defined victimization in terms of less favourable treatment, the Equality Act 2010 does not treat victimization as a form of discrimination.<sup>376</sup> Consequently, there is no longer a need to compare treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act.

Section 27 of the EA 2010 proscribes victimization which occurs when an employer subjects an employee or any other person to a detriment because the employee or other person;

- brought proceedings against the employer or any other person under the Equality Act 2010, or
- gave evidence or information in connection with such proceedings brought by any other person, or
- otherwise does anything under the Equality Act 2010 in relation to the employer or any other person, or
- alleged that the employer or other person has contravened the Equality Act, 2010.

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<sup>375</sup> Equality Act 2010 Section 40 (3).

<sup>376</sup> Section 55(1) and (2) DDA 1995.

The Act also makes it unlawful for an employer to Subject an employee or any other person to a detriment because the employer believes or suspects that the employee or other person has done or intends to do any of the above actions.<sup>377</sup> However, there will be no issue of victimization if any allegation of the employee or other person was false and not made in good faith.<sup>378</sup>

In determining whether a conduct amounts to harassment, the courts would apply a reasonableness test, taking into account all circumstances of the case especially the perception of the disabled person. Thus, although there is a reasonableness test, it is not necessarily an objective test as the view of the disabled person affected by the conduct is important. However, what is important here is the fact that, in determining whether or not a person has been guilty of harassment, courts will be expected to balance competing rights on the facts of each particular case.<sup>379</sup>

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<sup>377</sup> Equality Act 2010, Section 27 (1) (2).

<sup>378</sup> Equality Act 2010, Section 27(3)

<sup>379</sup> See generally Equality Act 2010, Section 26 (4) (a), (b) and (c).

<sup>380</sup> Equality Act 2010, Section 40 (3).

## **Chapter Four: Equality Schemes Need Prioritisation and the London Borough of Southwark**

### **Introduction**

The social integration of persons with disabilities into their communities through participation and the provision of welfare support to meet their needs have been recognised as an important dimension to the rights-based perspective of disability. According to Article 26 of the Charter of Fundamental Rights of the European Union (the European Social Charter), member states are called upon to recognise and respect the 'right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.'<sup>381</sup> However, one of the major challenges to the promotion of equality for persons with disabilities is the development of programmatic actions or positive measures as a way of giving expression to the rights of this group of citizens. This is due partly to the difficulties of accommodating the principles contained in the rights-based perspective of disability within the prism of polycentric socio-economic decisions that raise issues of resource allocation.<sup>382</sup> In this respect, inspiration may be provided by Article 52(5) of the European Social Charter which expressly permits the use of the charter as a vehicle for positive policy initiatives.

Within the context of the public sector equality duty, the legislative vehicle for ensuring the development of programmatic or positive action measures needed to break down barriers and make participation of persons with disabilities in the mainstream more possible are the Equality Schemes.<sup>383</sup> The Schemes are supposed not only to provide a framework for the delivery on the general duty but also to enable the co-ordination of the rights-based

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<sup>381</sup> The Charter of Fundamental Rights of the European Union was passed in 1961 by the European Commission and later revised in 1996.

<sup>382</sup> See generally, E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (supra no.133 pp 197-239. See also *R v Birmingham City Council and M, G and H v Birmingham City Council* (co-joint appeals) Neutral Citation Number: [2011] EWHC 1147 (Admin).

<sup>383</sup> The Equality Act 2010 (Specific Duties) Regulations 2011 SI No. 2260 do not require relevant public authorities to produce and publish an Equality Scheme which was a central requirement under the repealed DDA 1995, Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) Reg 2A & B.

approach to disability across a broad range of services. As a policy tool that complements the general duty on Public authorities to promote equality, the Schemes provide the basis for identifying new or emerging organisational priorities and how they could be linked to the promotion of equality for persons with disabilities.

This chapter analyses the Southwark council's Equality Schemes in the light of some of the key legal obligations under the general duty to promote equality and establishes that the Schemes are not just policy documents intended to assist the council in delivering on its general duty but represent a continuous long-term process of giving contextual meaning to the promotion of the rights of persons with disabilities. The chapter has been framed around two basic and interrelated themes which are capable of capturing the essence of substantive equality for persons with disabilities. First, the participation of persons with disabilities in policy formation and implementation within Southwark council is analysed within the framework of the dialogue leading up to the drawing up of the council's Equality schemes. Second, the chapter examines the council's process of needs identification and prioritisation within the context of the statutory duty to assess under the provisions of the NHS and Community Care Act 1990, the National Assistance Act 1948 and the Chronically Sick and Disabled Persons Act 1970. Particular attention is given to the Eligibility criteria which provide the framework for ensuring the responsiveness on the part of Southwark council to the rights and felt needs of the residents with disabilities.

## **1. Engaging With Persons with Disabilities**

### **1.1 The Development of the Southwark Equality Schemes**

Though the requirement to produce an Equality Scheme is a statutory one, an identification and examination of the circumstances leading to and surrounding their development could be of some significance in setting the legal and policy context for the implementation of the duty to promote disability equality by the London Borough of Southwark. The Equality Schemes may provide a window on to the values of the local authority. In this respect, this study noted that the schemes are not only underpinned by the Human Rights law but are

also animated by basic human values such as dignity, autonomy, equality and social cohesion.

### **1.1.1 The Disability Equality Scheme 2006**

In compliance with its statutory duty under the provisions of the Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) the London Borough of Southwark produced its first Disability Equality Scheme (DES) on 4<sup>th</sup> December 2006.<sup>384</sup> This scheme was annexed to the council's generic Equality Scheme which was adopted in 2005.<sup>385</sup> The generic scheme was developed to meet the council's equality agenda and its statutory responsibilities under section 71 of the Race Relation Act 1976<sup>386</sup> and encompassed all the equality strands. However, the fact that the Council decided to develop a separate scheme on disability notwithstanding its adoption of a generic equality scheme may represent an acknowledgment or recognition that Southwark council *is* alive to the need to maintain a disability-specific focus as an essential first step in overcoming the disadvantages linked to disability and to putting persons with disabilities on an equal footing with non-disabled people. This was important because, with the Council's decision to mainstream disability into its own internal processes, there is a real risk that the promotion of disability equality may be sidelined or relegated to the background in favour of other equality considerations such as the promotion of race equality. This was particularly relevant in the case of Southwark council where the existing equality systems and processes had been developed with a focus on race equality. Furthermore, it is significant that the Scheme commits the Council to the equality and anti-discrimination ideals of ensuring parity of outcome and equality of opportunity between the various groups in the community. The Scheme also identifies the participation of persons with disabilities as a strategy for the attainment of the Council's vision to make Southwark a better place to live, work, learn and have fun as a model of urbane sustainable living.

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<sup>384</sup> The Southwark Disability Equality Scheme (DES) 2005-8 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>385</sup> Annex 7, Southwark Race Equality Scheme 2005 available at [www.southwark.gov.uk/download/434/equalities](http://www.southwark.gov.uk/download/434/equalities) scheme.

<sup>386</sup> Race Relations Act (RRA) 1976, Section 71 imposed a duty on public bodies to promote race equality and to produce a Race Equality Scheme (RES). The RRA 1976, like the DDA 1995 has been replaced by the Equality Act 2010.

### **1.1.2 The Impact of the Lord Ouseley Report.**

Following a series of criticisms of the Council by the Local Government Ombudsman, the District Auditor, and the Council's Overview and Scrutiny Committee,<sup>387</sup> Southwark council decided in 2004 to commission an independent review of its Equality and Diversity Framework. The review was aimed, amongst others to provide suggestions or recommendations which would assist the Council in combating unlawful discrimination in its employment policies and service delivery. The review was headed by Lord Ouseley and recommended that the Council's Race Equality Scheme be expanded to include the other equality strands and that a panel of external stakeholders be created to assist the Council in the conduct of equality impact assessments.<sup>388</sup> The Southwark generic Equality Scheme 2005 was a direct outcome of the Lord Ouseley's report and, significantly provided a framework and momentum for the Council's delivery on disability equality. In other words, though the report was basically a policy document, it however provided a rich backdrop of ideas on the Council's management of equality and confirmed the fact that the council had the necessary political will to drive through the changes that is required by the duty to promote disability equality.

### **1.1.3 The Equality and Human Rights Scheme 2008-11.**

The Southwark council's equality agenda was fundamentally reviewed and revised in 2008 with the adoption of an Equality and Human Rights Scheme to cover the statutory three years period 2008-11.<sup>389</sup> The 2008 to 2011 scheme adopts a generic approach and covers all Equality grounds including Asylum seekers and Travellers. The significance to the Equality and anti-discrimination ideal of the Southwark council's Equality and Human Rights Scheme 2008-2011 could be located at two levels; first, the change situates the equality ideal of the scheme squarely in a human rights context. In other words, Southwark council recognises

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<sup>387</sup> Southwark Council, 'An Independent Review on the Equality and Diversity Framework of Southwark Council' (Lord H. Ouseley Report) 2005, p3 available at [www.southwark.gov.uk](http://www.southwark.gov.uk)

<sup>388</sup> The Equality and Diversity Panel of Southwark Council is a consultative body within the council which brings together stake holders and other persons outside the council to participate in the conduct of Equality Impact Assessments. The panel has existed since 2003. For more information, see generally [http://www.southwark.gov.uk/info/200041/equality\\_and\\_diversity/505/southwarks\\_vision\\_for\\_equalities/1](http://www.southwark.gov.uk/info/200041/equality_and_diversity/505/southwarks_vision_for_equalities/1)

<sup>389</sup> The Southwark Equality and Human Rights Scheme 2008-11 available at [www.Southwark.gov.uk/info/200041/equality](http://www.Southwark.gov.uk/info/200041/equality) and diversity (accessed April 2009).

that the implementation of the Scheme will have to be animated by the values encapsulated in all the human rights treaties to which the United Kingdom is a signatory. Of particular relevance here is Article 14 of the European Convention on Human Rights (ECHR) which prohibits discrimination on the enjoyment of any of the rights contained in the Convention on the basis of certain enumerated grounds, including disability.

In the area of employment, the Council would have to take cognisance of the provisions of Recitals 1 and 6 of the Framework Directive which espouses the commitment of the European Union to the achievement of human rights for all. This commitment was affirmed by the decision of the European Court of Justice (ECJ) in the *Mangold case*<sup>390</sup> which appears to support the proposition that the human rights rationale of the Framework Employment Directive is its dominant rationale. Second, the Scheme's generic approach reflects the approach to anti-discrimination adopted by the Framework Directive and the European Social Charter. The Framework Employment Directive<sup>391</sup> was adopted in November 2000 and it prohibits employment related discrimination (including that related to vocational training) on grounds of religion or belief, age, sexual orientation and disability. Most of the Directive consists of 'common' provisions which apply equally to all grounds. On its part, Article E of the Revised European Social Charter adopted in 1996 sets out a general prohibition against discrimination on several grounds which is understood to include disability.

The integrated, cross-strand approach adopted by Southwark council is important because it appears to lend support to the principle that there is no 'hierarchy' of discrimination.<sup>392</sup> Furthermore, this approach would enable Southwark council to develop a joint up approach to tackling discrimination and inequality by deepening the council's understanding of the interrelationship between anti-discrimination, equality and human rights. Also, the integrated approach may reflect a willingness on the part of Southwark council to engage in diversity

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<sup>390</sup> *Mangold v Rudiger Helm* C-144/04[2005] ECHI-9981

<sup>391</sup> Council Directive 2000/78/EC of 27 November 2000.

<sup>392</sup> See Southwark council's Equality Scheme 2005-8: consultation report available at [www.Southwark.gov.uk/download/435/equality](http://www.Southwark.gov.uk/download/435/equality) scheme 2005-8/findings of equality assessment.



along side equality and human rights.<sup>393</sup> However, a perennial concern here is that, with the adoption of the integrated approach to equality, Southwark council may be concerned with more generic, less group based equalities considerations. The danger of this approach is that considerations of structural inequality and social justice for persons with disabilities may be overshadowed by more market driven equality considerations that are underpinned by a diversity management agenda.

The values of the Southwark Equality and Human Rights Scheme are reflected in and reinforced by the Council's Sustainable Community Strategy, The Southwark 2016 adopted in 2007.<sup>394</sup> The Southwark 2016 sets out the borough's hopes and vision for the future and guides the work of all the statutory agencies as well as the voluntary, faith and business sectors. The document identifies three inter-related objectives which are underpinned by the twin impulses of enhancing economic rationality and honouring human rights:

- Improving life chances
- A better place for people
- Delivering quality services.

The significance of the Southwark 2016 to the substantive equality ideal lies not only in the fact that it is animated by basic human values such as dignity, autonomy, equality and community cohesion but most importantly in the fact that it provides a framework for tackling the persistent inequalities in the community and for creating a more equal society. The Council's corporate plan on equality and diversity is linked to The Southwark 2016. This document does not only identify further priorities with regards to disability equality but, most importantly outlines the Council's commitment to improving the life chances of persons with disabilities within the borough. Furthermore, the Council's Corporate Plan provides details of activities which demonstrate the council's commitment to improving equality outcomes in Southwark. These activities are

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<sup>393</sup> See generally Southwark's vision for equality available at [http://www.southwark.gov.uk/info/200041/equality\\_and\\_diversity/505/southwarks\\_vision\\_for\\_equalities/1](http://www.southwark.gov.uk/info/200041/equality_and_diversity/505/southwarks_vision_for_equalities/1)

<sup>394</sup> Details on the Southwark 2016 could be found at [www.southwark.gov.uk/download/753/southwark2016/sustainable/community/strategy](http://www.southwark.gov.uk/download/753/southwark2016/sustainable/community/strategy).

embedded within the Council's key strategies, which inform all the activities the council does. Importantly, these corporate strategies are monitored regularly, reviewed and reported on by the various departmental heads.<sup>395</sup>

## **1.2 Linking Participation and Substantive Equality in the Development of Equality Schemes**

An important data that emerged from this study is the degree to which Southwark council is positively encouraging the participation of both its residents and staff with disabilities in the development and implementation of policies and programs affecting their interests and wellbeing. This corresponds to a growing legislative trend towards the requirement of the participation of employees, service users and other stakeholders within the context of an informed dialogue to search for pluralistic solutions to the organisation's problems.<sup>396</sup> Though the involvement of the disability community was a legal requirement under the DDA 1995, its significance resonates with a much wider trend in the human rights arena towards the involvement of persons with disabilities in decisions affecting their interests.

At the level of the United Nations, Preamble (O) of the Convention on the Rights of Persons with Disabilities confirm the right of this group of persons to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.<sup>397</sup> According to the Convention, participation by persons with disabilities will result in their enhanced sense of belonging.<sup>398</sup> Also, Article 3(c) of the convention identifies participation as one of its General Principles and calls for the effective participation and inclusion of persons with disabilities in society. On its part, the Committee on the implementation of the European Social Charter has pointed out that Article 15(3) of the Charter requires that persons with disabilities and their representative

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<sup>395</sup> Southwark Council's Corporate Plan 2009-11 available at [www.southwark.gov.uk/download/2466/southwark/council corporate plan](http://www.southwark.gov.uk/download/2466/southwark/council%20corporate%20plan).

<sup>396</sup> See the Local Government and Public Health Act 2007 which propose an extension of scrutiny powers to hold other public bodies to account.

<sup>397</sup> The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) was ratified by the UK Government in October 2008.

<sup>398</sup> UNCRPD, Preamble (m).

organisations should be consulted, within the appropriate forum, in the design and ongoing review of any positive action measure intended to promote their social integration and participation in the community.<sup>399</sup>

The requirement under the DDA 1995 to involve persons with disabilities in the development of the Disability Equality Schemes was identified not only as the key element of the Disability Equality Duty but also as a unique element of Substantive equality for persons with disabilities.<sup>400</sup> At the least, such a requirement to involve persons with disabilities in the decision making process of public authorities represent a trend away from paternalism and towards basic rights for all in the disability context. This section took an empirical study of the participation of persons with disabilities in the development of the Southwark Equality Schemes and identified certain principles of substantive equality that flow from the requirement to involve persons with disabilities in policy development and implementation.

### **1.2.1 Self-Determination and the Concept of Empowerment**

The data relating to the participation of persons with disabilities in the development of the Southwark council's Equality Schemes were analysed within the framework of Iris Young's definitions of the concepts of domination and oppression because of the correlation between these concepts and the anti-discrimination ideal of autonomy and choice which is central to substantive equality for persons with disabilities.<sup>401</sup> Domination consists in institutional conditions which inhibit or prevent people from participating in decisions and processes that determine their actions and the conditions of their actions. The aspect of social justice that domination denies is self-determination. On its part, oppression consists in systematic institutional processes which prevent some people from learning and using satisfying or expansive skills in socially recognized settings, or which inhibit people's ability to play and communicate with others or to express their feelings and perspective on social life in contexts

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<sup>399</sup> The Charter of Fundamental Rights of the European Union (Revised), Conclusions 2003, Vol. 1, p.168.  
20. The United Nation's Convention on the Rights of Persons with Disabilities(UNCRPD); Preamble( O) recognises the right of persons with a disability to be involved in decisions on policies and programmes that directly affect them. Also Article 3(c) of the convention identifies as one of its general principles the Full and effective participation and inclusion in society of persons with disabilities.

<sup>401</sup> I. Young, *Inclusion and Democracy* supra no.166 p31.

where others can listen. The aspect of social justice that oppression denies is self-development.

The twin concepts of self-determination and self-development could be linked to the ideals of substantive equality and non-discrimination within the disability context. Persons with disabilities have been treated negatively in part because of their historically low status in society. This has not only given rise to feelings of superiority on the part of public service professionals but has also contributed in part to the fact that the voices of persons with disabilities have been silenced or discounted as lacking in the skills or knowledge required to self determine. In this respect, one of the main functions of the requirement of the participation of persons with a disability in the design and delivery of public services is to valorise the group and group identity of this group of citizens. In other words, the principle of participation does not only help in reversing the presumptions of inability that have characterise the treatment of persons with disabilities by public service professionals but also exposes their talents, abilities and capabilities and thus add to economic rationality by increasing the employment chances of this group of citizens.

An important data that emerged from the study with regard to the issue of self-determination is the extent to which persons with disabilities were actually involved in the planning and execution of the events relating to the development of the Council's equality schemes. The objective of empowerment and self determination for persons with disabilities will hardly be achieved if the process of consultation were designed and executed by the staff of the Council without the participation of its disabled residents. According to the Council's records, persons with disabilities and their representatives were involved in the planning of the consultations.<sup>402</sup> The Council established in spring 2006 an advisory group to advice on the most appropriate methods for involving persons with disabilities and to assist with identifying groups of disabled people to work with. The advisory group was made up of representatives from the Southwark Disability Forum (SDF) and The Southwark Disablement Association.

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<sup>402</sup> See Southwark council's Equality Scheme 2005-8: *supra* no.377.

There were certain important principles which could be extrapolated from the decision by Southwark council to involve representatives of persons with disabilities and user led disability organisations in the planning of the consultations to inform the development of their Scheme. First, the decision represents a positive step by the Council in empowering persons with disabilities to identify local priorities and to design services to meet their specific needs. In this way, the principle of participation helped achieve substantive equality for this group of citizens in the borough as it enabled the perspectives of these representatives to be taken in to account from the beginning of the process of policy design and formulation.

Second, the involvement of persons with disabilities in the planning stage of the consultations signified a normative change in the Council's relationship with its residents with a disability as it demonstrated a willingness to listen to and work on the ideas of this group of citizens. This shift from paternalism and protectionism to partnership and collaboration could indicate an alignment of the concept of empowerment, in its broadest sense, with a bottom-up rather than a top bottom approach to the design and implementation of policies which has the potential of delivering substantive equality.<sup>403</sup>

Third, the participation of persons with disabilities and their representative organisations provided the Council with an opportunity for debate and innovation within the organisation's equality structures. Engagement with the representatives of persons with disabilities would not only better plug the council into the wider community in which it operates but also placed the representatives themselves in a better position to participate in discussions influencing the direction of change in the Council. This relationship between Southwark council and its residents with disabilities has the potential to produced a fruitful and informed dialogue which could ensure responsiveness on the part of the Council to the rights and felt needs of the residents with disabilities.

It was clear from some of the representatives of persons with disabilities who participated in the meetings of the advisory committee that the way the consultation events were designed and probably executed took in to account and reflected the circumstances of persons with disabilities especially with regards to the venues and time of events. Taking in to account the

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<sup>403</sup> S. Fredman, 'Disability: A Challenge to the Existing Anti-Discrimination Paradigm?'supra no.8 pp. 219-248.

social circumstances of persons with disabilities is a first step towards achieving substantive equality. However, the process of involvement could have been more credible and empowering had Southwark Council allowed the entire process to be driven through by persons with disabilities and their organisations with the support and guidance of the staff of the Council. This could have given persons with disabilities more control and power over the process and its outcome and thus increase their capacity to become agents of change of their own circumstances.<sup>404</sup>

However, discrimination is about power<sup>405</sup> and since a key issue in the participation of persons with disabilities in policy formulation and implementation is power and control, it may well be that the Council's policy makers and administrators were reluctant to surrender their dominant position and control and let persons with disabilities decide in which way programs affecting them will develop. While this reluctance may reflect a lack of trust on the part of the Council of the abilities of persons with disabilities to exercise power and control, what Southwark council must recognise is the fact that the participatory approach to equality and non discrimination encapsulated in the public sector duty to promote equality will have to be a people-driven process of change that generates and influences policies.

### **1.2.1 Participatory Diversity and substantive Equality**

An important data that emerged from this study with regard to the consultations for the Southwark DES was the way the Council used the process to engage with equality and diversity in the context of the participatory rights of persons with disabilities. Diversity here refers not only to the involvement of persons without a disability but also to the heterogeneity of persons with disabilities themselves in terms of their impairment, ethnicity, age and gender. Participatory diversity was crucial in this context not only because to fully respect the difference of disability entails positively acknowledging the heterogeneity of

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<sup>404</sup> For details on how the participation of community organisations can influence economic change, see generally M. Beirne, 'Social and Economic Rights as Agents for Change' supra no.165 pp43-62.

<sup>405</sup> S. Witcher, 'Mainstreaming Equality Theories: Towards a Generic Model of Discrimination', accessed in July 2007, available at [www.creid.ed.ac.uk/events/seminar](http://www.creid.ed.ac.uk/events/seminar).

persons with disabilities but also because it demonstrated a commitment on the part of the Council to move beyond respecting difference to accommodating it.

The report on the consultations carried out to inform the Equality Schemes establish that participatory diversity was a central concern of the Council. This is demonstrated by the range of the persons who participated in the events in terms of their impairments or non impairment, ethnicity, social – economic class and cultural background. In particular, it would appear that Southwark council used the concept of participatory diversity to apply the Social model of disability by extending the upper limits of those considered as disabled beyond the definition of the Equality Act 2010.<sup>406</sup> In fact, the Council actively encouraged the participation of the carers, families and friends of persons with disabilities at the various events organised. This is significant when one considers the fact that this group of persons constitute an important part of the autonomy and sense of self dignity and worth of persons with disabilities.<sup>407</sup> To limit the benefits of a process that is focussed on the issue of negative treatment and discrimination only to certain kinds of disability or impairments without their carers, families or friends would not appear to be consistent with the ideals of substantive equality for persons with disabilities.

The use of the concept of Participatory diversity as an analytical category in understanding the participation of persons with disabilities in the development of the Southwark DES is significant in two respects; first, the approach follows a well-established pattern towards greater disaggregation and a concern to recognize heterogeneity within disability categories.<sup>408</sup> By engaging with diversity in the development of its DES, Southwark council recognises that persons with disabilities are not a homogenous group and that achieving substantive equality for this group of persons would involve an appreciation

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<sup>406</sup> For the legal definition of a disabled person, see Section 6, Equality Act 2010. According to the Act, a person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. Also, Schedule 1(a) (b) , Schedule 1 Section 9

<sup>407</sup> For an expansive approach to the definition of disability, see *Coleman v Attridge Law* (Case C-303/06) [2008] IRLR 722 (ECJ). This could be contrasted with the decision in *Chacon Navas v Eurest Colectividades SA* C-13/05[2006] ECR, where the court took a restrictive approach by holding that sickness did not constitute a disability.

<sup>408</sup> D. Mabbett, 'Why have disability categories in social security?' 11, 38 *Benefits* 2003pp163-8.

of their heterogeneity. The group dimension to disability equality has a tendency to consider persons with disabilities as a homogenous group and this may sit uncomfortably with the notion of substantive equality.<sup>409</sup> The group dimension to disability equality may fail to recognise the heterogeneity of persons with disabilities not only by ignoring the different needs that arise from different impairments but also by freezing the fluidity of the personal experiences of this group of persons in to a single unified entity.

Second, it may be the case that by engaging with diversity, involving diverse persons with different impairments from different backgrounds, Southwark council recognises that group differentiation offers communicative resources to the process of participation because differently positioned people have different experience, history, and social knowledge derived from that positioning.<sup>410</sup> Most of the staff of the Council interviewed for this project felt that the diversity of the participants at the consultation events enriched the process of participation as the different persons with disabilities, including various stakeholders were able to contribute their views and experiences so that the recommendations at the end of the events were practical and implementable.

Third, the concept of Participatory diversity might be used to manage the constant changes in the patterns of disability discrimination brought about by demographic and technological changes. This would serve the purpose of counteracting a merely reactive approach to structural changes and thus avoid any negative perception of equality policies as outdated irrelevancies. Finally, the diversity of the participants signified the willingness and capacity of persons with disabilities in the community to act in concert and in common in asserting their rights and to bring about changes in their socio – economic circumstances.

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<sup>409</sup> C. O'cinneide, 'A New Generation of Equality Legislation? Supra no.2 pp 219-248.

<sup>410</sup> I. Young, supra no166 pp 81-108.



### **1.2.3 Community Engagement and Social Cohesion**

One of the building blocks in the development of the Southwark Equality Scheme was the commitment of the Council to build a cohesive community by promoting good relations between the different groups in the community.<sup>411</sup> This is of central importance when it is acknowledged that the essentialism of the group dimension approach to disability equality may undermine the fact that equality and discrimination are relational concepts by setting up rigid inside-outside distinctions among the different groups in society and thus ignore the fluidity of social relations. One of the key strength of the positive duty to promote equality is its recognition that equality entails more than the negative requirement of avoiding unfair disadvantage owing to identity.

The promotion of good relations in the community now forms part of the general duty under the Equality Act 2010 and underpins the shared values of the Southwark Sustainable Community Strategy which provide the strategic framework for the promotion of equality between the different groups in the community. It was perhaps inevitable that the paradigm shift in disability equality encapsulated in the public sector equality duty would eventually be reflected in the Council's corporate community cohesion strategy. This has not only resulted in certain important changes in the corporate structures but also in increased joined-up workings between different departments of the Council.

There were three lessons that could be extrapolated from the Southwark equality schemes regarding the promotion of community cohesion which could be linked to the delivery of substantive equality for persons with disabilities; first, by framing disability as a relational concept within the context of the social model of disability, the council was able to link the legal requirement of participation to achieving social cohesion. In other words, the approach demonstrated how a local authority's processes for community engagement could be integrated with its processes for ensuring compliance with its legal duty to promote the participation of persons with disabilities. It is more likely that such an approach would better plug the Council's policy into the wider society in which it operates and thus afford it

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<sup>411</sup> Southwark Equality Scheme 2005-8, Annex 5: Consulting with Diverse and Excluded Communities.

greater legitimacy and credibility. Furthermore, conceptualising disability as a relational concept that defines the relationship between persons with disabilities and the Council could breed trust and thus improve the delivery of services by public bodies.

Second, the involvement of representatives and groups of persons with disabilities in the planning of the consultation events meant that strategies of involvement were adopted which enabled the Council to reach out to hard to reach communities within the borough, thus ensuring a positive turn out to the consultation events. Discrimination is as much about social exclusion as it is about less favourable treatment and it may be the case that, by encouraging the interaction of both persons with disabilities and non disabled residents Southwark council not only appreciated that disability is a relational concept but also was using the event to promote social cohesion.<sup>412</sup>

Third, the involvement of a range of user led disability organisations within the borough such as the Southwark Disability Forum (SDF), the Organisation for Blind Africans and Caribbeans (OBAC) and the local representative organisation for the hard to hear ensured that the participation was broad-based, encompassing both persons with physical and sensory impairments. Since these organisations are bodies of large memberships, they provide a network of real or potential participants for the Council's consultations which may help enrich and enhance the participatory rights of persons with disabilities in Southwark. Furthermore, working with other statutory agencies and voluntary organisations in the borough during the consultation process did not only provide Southwark council with an opportunity to link up strategies and policies but also enabled persons with disabilities to improve their knowledge of their environment and to create new contacts. For example, during one of the workshops with the Southwark Disability Forum (SDF), and attended by the Metropolitan Police, persons with disabilities were able to talk about their experiences and concerns about community safety and harassment.

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<sup>412</sup> See generally H. Collins 'Discrimination, Equality and Social Inclusion' *supra* no.133 pp16-43.

The discussions gave the Police new insights in to the community safety concerns of this group of citizens and enabled them to develop new and innovative strategies for dealing with the concerns. Significantly, a link up project called the Community Safety Network was developed whereby those persons with disabilities who have experienced harassment in the borough were given the telephone numbers of individual Police Officers whom they could contact at any time should they be subjected to further harassment. The project did not only build confidence between the police and residents with disabilities but most importantly provided a real mechanism which could pre-empt unfortunate situations such as the death by suicide of a mother and her disabled child in Leicester because of taunting and harassment from other local children (suicide reported on BBC Channel 4 news of Tuesday, 29.09.09).

#### **1.2.4 Transparency and Trust**

An important dimension of the formation of the Southwark equality schemes was the determination of the Council to build trust through transparency.<sup>413</sup> Transparency in this context refers to how the Council was able to make information about the consultations accessible and assessable and this was analysed from three central perspectives; standard-setting, culture change and information-gathering.

With regard to standard-bearing, the Council did realise that, in order to engender trust, it was important not only to make the distinction to participants between involvement as a process and participation in the routine consultations of the council at the start of every event but also to explain clearly the purpose of the process and its outcomes. An important data that emerged from this case is the high level of attendance at events organised to inform the development of the equality scheme. Southwark council asserts that over 350 persons attended the events, and from the interviews conducted with some of the participants, this high turnout could be attributed to the fact that residents with disabilities, their families, carers, friends and their representative organisations were willing to get involved in the

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<sup>413</sup> The government has identified transparency as a lynchpin for The Equality Act 2010(Statutory Duties) Regulations 2011 SI No. 2260. See generally, Equality Act 2010. The public sector Equality Duty Promoting equality through transparency A consultation. October 2010.

events because of the amount of information that was made available to them by the Council in terms of the purpose and aims of the process which was seen as distinct from the routine consultations by the Council. Persons with disabilities saw their involvement as an active and probably continuous process of dialogue between themselves and the Council in which the purpose of the process and its outcomes were clear. Such a communicative approach does not only establish the legitimacy of the process of participation but also ensures the robustness of the evidence obtained through the process.

The element of culture change was linked to the commitment of the senior managers of Southwark council to be a part of the process of change encapsulated in the equality duty. Such a commitment is vital for the successful implementation of the statutory duty on disability by the council and this fact was acknowledged by their involvement in the development of the Council's equality schemes. The involvement of the senior leadership of the Council in the development of the equality schemes is significant in two respects: first, the involvement and commitment has the potential not only to embed the importance of disability equality within the council but also provide opportunities for having disability issues considered at higher levels. The fact that the Chief Executive of the council and his assistant participated in some of the discussions leading up to the drawing up of the Council's DES showed commitment and demonstrated, to a large extent that the commitment is not just lip service.

Second, their involvement may signify a culture change and a willingness on the part of the Council's leadership to relate with persons with disability as partners, in a less patronising manner that enhances rather than diminish their sense of dignity. Unfortunately, this culture change from paternalism to equality does not appear to be widespread in the council as in some of the meetings attended by officials of the social policy unit and other directors from the Council, the consultations were conducted in a patronising manner which may have caused many persons with disabilities not to speak freely their minds or concerns for fear of being labelled as difficult. An executive member of the Southwark Pensioners Forum who has a disability and is a member of the Southwark Disability Forum stated that she was reluctant to speak out on the Council's policies because she is already considered by council officials as difficult. If this is a true reflection of what is actually happening with regard

to the participation of and consultation with persons with disabilities, then this represents a significant lever for change that is currently under-exploited by Southwark council.

Discrimination is about power relations. Conflict can arise when those in power feel threatened. The reluctance of managers and directors of the Council to discard their patronising attitude in their dealings with persons with disabilities may be about the fear of losing power. This fear is more evident in instances of public involvement exercises where those in power feel it is their job at all levels to make decisions on behalf of persons with disabilities. It is important that managers and other officers of Southwark council recognize that the purpose for the involvement of persons with disabilities in the drawing up and subsequent review of the DES is to obtain information and gain understanding of their needs and concerns. The involvement of persons with disabilities in the decision making process of the Council is more about power sharing and therefore should not involve loss of power. Furthermore, Southwark council must understand that a communicative democracy does not only require a wide representation of opinions in discussions leading to policy decisions but, most significantly, require the free expression and challenging of opinions.

### **1.3 Structures for Sustained Participation**

The structures which an organisation creates for promoting equality may be as important as the law itself. Southwark council has developed formal structures through which an informed dialogue could be enhanced on an on-going basis between the residents of the borough and the council and between and within the organisation itself. Two issues of principles could be extrapolated with regard to the equality structures of the council. First, it was evident to this study that Southwark council was able to convert the opportunity afforded by the consultations for the drawing up of the equality schemes into an opportunity for debate and innovation within the organisation's equality structures. Second, it was important that the variation in the governing framework of the equality structures traced through to the mechanisms for decision-making in the Council.

### 1.3.1 The Communities of Interest

The Communities of Interests which Young<sup>414</sup> refers to as Affinity Groupings are an important structure in the equality framework of Southwark council capable of promoting the rights of persons with disabilities in the borough. There are currently 4 Communities of interest in the borough representing what the Council refers to as [marginalized and hard to reach communities]. Even though most or all of the communities of interests may be potentially relevant to disability in terms of the multiple identities which individuals may have, the focus here is on the Southwark Disability Forum and the Southwark Pensioners Forum by virtue of their direct relevance to disability and age. The Southwark Pensioners Forum brings together the elderly and pensioners of the borough while the SDF is the forum of persons with disabilities.

This study identified the importance of the Communities of interests in fostering the ideal of substantive equality in the context of disability. First, they provide a forum for persons with disabilities in the borough to come together to discuss their experiences and needs and concerns and to act in concert in bringing about a change in their circumstances. Second, to the extent that the Communities of interest spring from the everyday lives and activities of the residents of the borough, they are a part of the wider civil society. In this respect, The Communities of Interest do not only provide a gateway for the Council to reach and understand the needs and concerns of persons with disabilities in the borough and to articulate policies to meet those needs but also represents an acknowledgment by the Council that, at the bottom line it is persons with disabilities who must be the primary agents of their own change.

Third, the Communities of interest are not only self-organising but membership is voluntary in the sense that individuals become members for the particular purpose of enhancing intrinsic social values. Finally, the Communities of interest are directly democratic. They are governed according to rules collectively adopted by the members. To this extent the communities of interest can be schools of self-government capable of promoting not only the

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<sup>414</sup> I Young, *supra* no. 166 pp 154-188.

goals of self-determination and self-development but also of enhancing the participatory rights of the members. Though the management of the SDF is made up entirely of persons with disabilities, under scoring a potential for empowerment and self – development of persons with disabilities, the Council has a staff solely dedicated to providing support and guidance to the forum and this support was instrumental in achieving the high degree of participation of members of the forum during the consultations to inform the development of the Council’s DES.

### 1.3.2 The Disabled Staff Group

One of the important outcomes of the Lord Ousley’s report and which was given practical implementation by Southwark council during the consultations for the drawing up of the DES was the creation of the Disabled Staff Forums as a consultative group within the Council. The creation of the Group marked an important milestone in the attempt of the Council to institutionalise the participation of the staff in the decision making machinery of the Council. It resonates well with a significant trend towards statutory requirements to inform and consult workers, encapsulated in the DTI discussion paper-*High Performance Workplaces, The Role of Employee Involvement in a Modern Economy*<sup>415</sup> and culminating in the 2002 EU Directive that 'established a general framework for informing and consulting employees in the European Community'.<sup>416</sup>

Two aspects of the Southwark Disabled Staff Forum were identified in this study which could assist in understanding its potential to promote the ideal of substantive equality in Southwark council. First, as a consultative structure of the Council the disabled staff group was a creation of the Human Resources department of the council rather than the council’s Social Policy Unit which has primary responsibility for equality issues in the council. Equality may not appear central to the concerns of the Human Resources department whose operations are grounded in the legal approach encapsulated in the anti-discrimination paradigm.

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<sup>415</sup> High Performance Workplaces: The Role of Employee involvement. in a Modern Economy. A DTI discussion paper July 2002 available at <http://www.bis.gov.uk/files/file26555.pdf>.

<sup>416</sup> EU Directive 2002/14/EC.

Second, there is a potential for a clash between the operations of the Disabled Staff Group (dsg) and the UNISON-Disabled Staff Group within the organisation which may undermine rather than promote the attainment of substantive equality for staff with disabilities in Southwark council. the disabled staff group, as opposed to the Unison Disabled Staff Group which is a part of the UNISON trade union, was formed mainly to enhance participation for the development of the council's DES. All Southwark staff with disabilities, including those with long term health problems could be members of the Southwark disabled staff group while only paid and registered members of the trade Union Unison are members of the Unison disabled staff group. It may be the case that, given the fact that the HR department has traditionally worked with the Unison Disabled Staff Group on matters of disability equality especially within the anti-discrimination context, the DSG may be side-tracked by the HR department on matters of disability equality on the basis that it did not consider that there are any new ideas that the group could offer outside those already advanced through the Unison group.

## **2. Needs Assessments and Prioritisation in the Provision of Welfare Services**

### **2.1 The Provision of Welfare Services as a Positive Right**

An important dimension to substantive equality for persons with disabilities is the ability of local authorities to develop positive action measures to meet the disability-specific needs of this group of citizens as a way of promoting and securing their independence, social integration and participation in the life of the community. One of the means by which the needs of persons with disabilities could be met is by the provision of welfare services through the social security system. Article 34 of the European Charter of Fundamental Rights states that the union recognizes and respects the entitlement to social security benefits and to housing and social assistance so as to ensure a decent existence for all those who lack sufficient resources.

The provision of welfare services to meet the needs of persons with disabilities has also been recognized as a (positive right) by the United Nations. In the UN *Standard Rules*, governments are asked "to create legal bases" for entitlements of people with



disabilities. The Rules posit that "the principle of equal *rights* implies that the *needs* of each and every individual are of equal importance, that those needs must be made the basis for planning."<sup>417</sup> At a time of budgetary squeeze, the government like most local authorities in the UK is reviewing the rationalisation of the provision of social welfare services through the system of needs identification and assessments. These reviews would have a profound impact not only on the rights and expectations of persons with disabilities but may undermine their right and ability to participate as equal members in the community.<sup>418</sup>

### **2.1.1 The Social Welfare Approach To Needs Assessment: Paternalism Versus Autonomy**

Professor Fredman has pointed out that Positive duties bridges the gap between the social welfare and the legal approaches to disability equality.<sup>419</sup> Traditionally, social security legislations designed to provide for particular consequences of disability generally tended to reinforce an attitude that too readily accepted as natural the absence of persons with disabilities from the mainstream of society. The focus of the social welfare approach was not on ensuring the social integration and participation of persons with disabilities but on providing welfare support to compensate for the effects of disability.<sup>420</sup> The system of social support under social security legislations is now complemented and reinforced by the ideals of anti-discrimination and equality encapsulated in the public sector equality duty. According to section 149(3) Equality Act 2010, Public authorities, as part of their duty to promote equality of opportunity , are required to take steps not only to

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<sup>417</sup> Standard Rules on the Equalisation of Opportunities for persons with disabilities adopted by General Assembly Resolution 48/96 of 20 December 1993, paras 25 and 26.

<sup>418</sup> *R v Birmingham City Council and M, G and H v Birmingham City Council* (co-joint appeals) [2011] EWHC 1147 (Admin). Persons with disabilities have rallied to oppose the decision of some local authorities to reduce the financial support for welfare services. For details on this opposition by persons with disabilities, see generally [www.dpac.uk.net](http://www.dpac.uk.net).

<sup>419</sup> S. Fredman, 'Human Rights Transformed', *supra* no.190 p498

<sup>420</sup> A. Hendriks, 'Promoting the Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005). Pp 187-198. Quinn contends that the real problem with the social welfare approach was the fact that it was unaccompanied by any thoroughgoing sense of the moral responsibility of society to remove arbitrary barriers in the way of participation by persons with disabilities; G. Quinn, 'The Human Rights of People with Disabilities Under the EU Law' *supra* no.11 p. 281.

eliminate or minimise the disadvantages suffered by persons with disabilities but also to meet their needs which are associated to their disability.

However, it may be the case that the two legislations have been written to differing and potentially contradictory, agendas. Discrimination law is driven by respect for autonomy and individual rights to equality of treatment while social welfare legislations are underpinned by a spirit of charity and paternalism. Respect for the autonomy and rights of a person with a disability to equal treatment assigns his wishes a high priority and may require that he or she be consulted with regard to what may be required to meet his or her needs. In contrast, paternalistic protectionism may mandate that the autonomous choice of a person with a disability be overridden and that the needs of persons with disabilities be determined by professionals for the greater good of the many or, paternalistically, for their own 'best interest'. However, it is now accepted that social welfare and anti-discrimination laws are not necessarily mutually exclusive but that they are, on the contrary, complementary to one another. The relationship between the social welfare approach and the ideals of equality and non-discrimination serves to underscore the reality that social programmes alone will not be sufficient to deliver substantive equality to persons with disabilities and that "in order to truly animate the material basis of human freedom, social programmes must be linked to an agenda that moves beyond maintaining people and towards positioning them to enter and remain in society. In the same way, a consistent commitment to human autonomy and freedom requires some degree of social solidarity in order to make the allure of freedom real for those who require assistance."<sup>421</sup>

### **2.1.2 The Legal Framework for the Duty to Assess**

The social and welfare needs of persons with disabilities are not to be met in a legal vacuum. This point is buttressed by Article 15(3) of the European Social Charter which requires that the positive actions in fields such as housing, transport, telecommunications, cultural and leisure facilities aimed at achieving the goals of social integration and participation of persons with disabilities in the community should be based on a clear legislative basis.

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<sup>421</sup> G. Quinn, 'The European Social Charter and EU Anti-discrimination Law' *supra* no.42 pp279-304.

Within the context of the provision of community care services, the main legislations imposing a statutory duty to assess the needs of persons with disabilities on local authorities are the Chronically Sick and Disabled Persons Act (CSDPA) 1970 and the National Assistance Act 1948. The 1948 Act establishes the basic qualifications of a person as disabled for the purposes of social need and places a duty on local authorities to make provision for residential care.<sup>422</sup> On its part, the 1970 Act requires local authorities to address and provide for the needs and care of persons with disabilities in the community.<sup>423</sup> However, the overarching duty on local authorities to carry out an assessment of needs is set out in the NHS and Community Care Act (NHSCCA) 1990 which imposes on local authorities a financial and legal duty to plan for and provide local community care services for their residents with disabilities based upon an assessment of individual needs.<sup>424</sup>

These legislations do not only establish the right of persons with disabilities to an assessment of their needs and the provision of practical assistance to meet these needs but together have been determined to give rise to four statutory duties on the part of local authorities: (1) to obtain information about the number of persons with disabilities within the locality; (2) to assess the needs of each individual with a disability within the jurisdiction of the relevant local authority in respect of the listed statutory services; (3) where an individual with a disability has an unmet need, to inform him or her of any welfare or support services provided by the local authority; and (4) to make arrangements for the direct or indirect provision of that service.<sup>425</sup>

It is not clear when exactly it could be said that the duty to carry out an assessment of the needs of a person with a disability is triggered. However, the House of Lords affirmed in

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<sup>422</sup> Section 29 of NAA.

<sup>423</sup> Section 2(1)(a) of CSDPA

<sup>424</sup> Section 47 of NHSCCA

<sup>425</sup> J. Cooper and S. Vernon, *Disability and the Law*, (London, Jessica Kingsley Publishers 1996). Also, B. Doyle, 'From Welfare to Rights? Disability and Legal Change in the United Kingdom in the Late 1990s' in M. Jones and L. A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing, 1999).pp209-226.

*R v Gloucester County Council, ex parte Barry*<sup>426</sup> that the duty is triggered whenever it appears to a local authority that someone for whom they may provide community care services may be in need of such services'. In *R v Bristol City Council, ex p. Penfold*<sup>427</sup> the claimant applied for a community care assessment but the authority argued that because its policies on 'need' for s.21 could not conceivably lead to a decision to provide accommodation to the claimant, there was no duty to assess her. The Court held that the duty to assess was triggered by the appearance of need for any service which could be provided, not one which was, as a matter of local policy and practice, actually likely to be provided. The right to refuse assessment would only arise in a case where no reasonable authority could possibly think that the applicant appeared to be even possibly in need of any community care service which could legally be provided under any of the relevant legislation.

Furthermore, the assessment process must be reasonable in order to ensure equality of outcome and this applies also to instances of reassessments as the right to be assessed includes the right to be reassessed. Reasonableness in this context includes not only the range of issues covered during the assessment but also a consideration of the thought-process of the assessor. In *R v Haringey LBC*<sup>428</sup> the court held that it was unlawful for a local authority to tell managers they were obliged to assess personal care needs, but not bound to assess 'social' or 'exceptional' needs.' Excluding these whole areas of need was a mistake of law, because the list of potential services set out in the legislation' provides an overall indication of areas of need which the statute requires to be considered, even if the need does not then meet the 'necessity for intervention' test.

### **2.1.3 The Work Capacity Assessment and the Employment Support Allowance**

An important element of the Welfare Act 2007 is the requirement that claimants of the Employment and Support Allowance(ESA) undergo a health or medical assessment to

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<sup>426</sup> [1997] AC 584, [1998] 2 ALL ER 770.

<sup>427</sup> [1998] 1 CCLR 315.

<sup>428</sup> *R v Haringey LBC exp. Norton* (no.2) (1998) 1 CCLR 168.

establish their capacity to take up employment. The Employment and Support Allowance replaced the incapacity benefits received by persons with disabilities and long-term health conditions who were unable to work. To be entitled to Employment and Support Allowance, claimants must be found to have limited capability for work in the sense that their current health condition or disability restricts their ability to work<sup>429</sup>.

The WCA has a medical component which is a point-based assessment whereby claimants score points against a series of functional descriptors and is focused on the overall effects of any health condition or disability on a claimant's ability to carry out a range of everyday activities in terms of his or her physical, mental, cognitive and intellectual functions.<sup>430</sup> There are three possible outcomes of the assessment for claimants. First, claimant's who score less than 15 points are assessed as fully fit to work. These claimants are not eligible for ESA but can claim Jobseeker's Allowance (JSA), with the accompanying responsibility to look for work. Second, claimant's who score 15 points and are assessed as having limited capability for work at present. Such persons are considered as being able to prepare for a return to work and are placed in the Work Related Activity Group (WRAG). They are eligible to claim ESA (either contributory or income-related) and will take part in work-focused interviews with a personal adviser, and have access to a range of support to help them prepare for suitable work. The third category is the 'Support Group' and consists of those claimants who are considered as having limited capability for work. The claimants in the Support Group will receive the higher rate of Employment and Support Allowance and do not have to take part in any work-related activity as a condition of receiving benefit.<sup>431</sup>

It was important to this study to understand the extent to which the Work Capability Assessment supports the ideals of equality and non-discrimination by providing an accurate assessment of the capability of a person with a disability to work which is useful to

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<sup>429</sup> See generally, Part 1 of the Welfare Act 2007.

<sup>430</sup> A Guide to Employment and Support Allowance-The Work Capacity Assessment ESA214, Department for Work and Pensions June 2011. Available at [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg\\_177366.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg_177366.pdf)

<sup>431</sup> A Guide to Employment and Support Allowance, Supra no.52.

employers. First, the medical component of the assessment is largely a computer-based exercise, rendering it impersonal, mechanistic and lacking in clarity.<sup>432</sup> In fact, not only are the claimant's answers given in an interview recorded into a computer system but the decision whether a claimant is eligible for ESA is based largely on points generated by the computer. Such a system of assessment is potentially flawed as the data gathering process is inaccurate and highly susceptible to human error. Furthermore, a computer-based assessment does not promote the participation of persons with disabilities in the process and has the potential of undermining the autonomy of this group of persons.

Second, the medicalisation of the WCA has the potential of casting persons with disabilities as objects of medical ethics rather than law, let alone discrimination or human rights law. The implication here is that acts which may amount to discrimination against persons with disabilities or a breach of their fundamental human rights may be considered as acceptable as long as it does not violate the medical ethics or is contrary to health law and is not included in the definition of discrimination by the Equality Act 2010. Third, the WCA assessment process can have a negative impact on the health of persons with disabilities and thus perpetuate rather than mitigate against the effects of disability. The WCA reinforces the medical model of disability which considers the absence of disease or an impairment as a pre-requisite for health. factors enhancing and jeopardising the health of persons with disabilities reach far beyond the impairment of the individual and what the WCA reflects are the evolving approaches not only to meeting the needs of persons with disabilities but also to disability equality in the domain of social welfare. However, what links the different approaches is the fact that the provision of welfare support to persons with disabilities is still conceptualised as societal compensation for impairments or for an individual's inability to earn his or her livelihood.

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<sup>432</sup> The Role of Incapacity Benefit Reassessment in Helping Claimants into Employment - House of Commons, Work and Pensions Committee HC 1015, 26 July 2011. available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101502.htm>.

#### 2.1.4 Statutory Duties and Powers: the Implications on Needs Assessments

While the social security legislations may be said to provide a clear legislative basis for the provision of social services to meet the needs of persons with disabilities, the questions have turned upon whether the duties under these legislations are 'duties' or 'powers'. The line between these two functions is neither well-defined nor easily predicted. Duties are mandatory requirements established by law whilst powers are discretionary, conditional or enabling provisions within which there is an element of discretion concerning performance. Within the context of the duty to promote disability equality, the importance of the distinction may be analysed from two different but interrelated levels

First, though the principle of assessment is linked directly to the relationship between persons with disabilities and professional power and discretion, the House of Lords in *R v Gloucester County Council, ex parte Barry*<sup>433</sup> concluded that the right to be assessed is a statutory right which could not be denied simply on the basis of a lack of resources. In *R v Borough of Kensington and Chelsea, ex parte Kujtim*,<sup>434</sup> the Court of Appeal held that the authority had a continuing duty, as opposed to a discretion under section 21 of the National Assistance Act 1948 to provide shelter for a person with a disability who was assessed as being 'in urgent need of care and attention'. Once the duty to make arrangements has arisen, a lack of resources is irrelevant to performance of the duty and Services could not be withdrawn without a reassessment.

Second, in *Elaine McDonald v London Borough of Chelsea RBC*<sup>435</sup> the Supreme Court considered the effect of the statutory duty to promote equality in the context of the provision of welfare services and held that the relationship between the duty to promote equality and social welfare legislations aimed at providing for the needs of persons with disabilities is one of substance and not procedure. The duty to promote equality does not compliment but rather is inherent in the social welfare legislations and that where a local authority is exercising its

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<sup>433</sup> [1998] 2 ALL ER 770.

<sup>434</sup> [1999] WL 478029.

<sup>435</sup> *R (Elaine McDonald) v Kensington & Chelsea RBC* [2010] EWCA Civ 110.

statutory functions under the social welfare legislations that expressly direct its attention to the needs of persons with disabilities, there would be no need for such an authority to make any express reference to the statutory duty to promote equality. This position could be distinguished from the decision in *Pieretti v Enfield London Borough Council*<sup>436</sup> where it was held that the section 49A DDA 1995 duty complements a housing authority's duties to the homeless under Part 7 of the Housing Act 1996.

## **2.2 Establishing Eligibility Criteria for Meeting Needs**

Eligibility criteria have been recognized by the courts as a legitimate tool for rationing finite resources by local authorities. In the *Gloucester case*,<sup>437</sup> the House of Lords established that 'needs' must be identified against eligibility criteria set with regard to the authority's budget. This point is reinforced by the provisions of the national guidance '*Fair Access to Care Services*' (*FACS*"), issued by the Secretary of State for Health under section 7(1) of the Local Authority Social Services Act 1970. The eligibility criteria provide a framework for local authorities to prioritise the needs of people who are in greatest need and at greatest risk in terms of the delivery of care services.

The eligibility criteria established by Southwark council consider the 'risks' to the health, safety and Independence of the individual with a disability and then prioritises them into one of four priority band critical, substantial moderate or low risk. Two issues could be extrapolated and linked to the substantive equality paradigm. First, the Council's eligibility criteria was reviewed in November 2008 and a new eligibility threshold adopted under which individual budgets would be funded from 2010 only to meet those needs which were assessed to be critical.<sup>438</sup> Raising the level of the eligibility threshold understandably have led to concerns that the Council is not only using the eligibility criteria as a way of restricting the number of people receiving any form of support from the authorities but that some persons with disabilities who ought to be receiving support are now being ruled as ineligible.

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<sup>436</sup> [2010] EWCA Civ 1104; [2011] PTSR 565

<sup>437</sup> *R v Gloucester, ex parte Barry* [1997] AC 584, [1998] 2 ALL ER 770.

<sup>438</sup> Your views matter: Consultation paper on access to adult social care in Southwark June-26 September 2008. Available at [http://www.southwark.gov.uk/download/1741/consultation\\_document](http://www.southwark.gov.uk/download/1741/consultation_document). (accessed October 2008).



Second, the distinctions in the eligibility criteria has the potential to stigmatise those who do not qualify for support or perpetuate the view that they are less deserving of concern, respect or consideration than others. The practical effect is that such distinctions demonstrates the many ambiguities and tensions within the vision of substantive equality for persons with disabilities; t e n s i o n s between individuals with a disability in need of social welfare support and the fiduciary duties of local authorities, between economic and social aims of equality, and between traditional and transformative notions of human rights.

### **2.2.1 Eligibility Criteria and the Notion of Equal Treatment**

The Eligibility criteria provide a means, in theory, to treat with reasonable consistency everyone within a local authority's boundaries. In other words, the eligibility criteria are underpinned by the notion of equal treatment. Within the context of the provision of welfare services to persons with disabilities, framing the eligibility criteria solely around the principle of consistency as fairness may signify an adherence to the notion of formal equality which may be problematic for substantive equality. First, the eligibility criteria is an important gateway to the provision of services to meet the needs of persons with disabilities. In other words, both the assessment exercise and the eligibility criteria constitute a process towards guaranteeing to "persons with disabilities the same rights as other persons". However, the eligibility criteria determines a procedure rather than an outcome. It is concerned with ensuring equal treatment and observance of rational principles on the face of limited resources and thus lacks any real conceptual Framework to cope with the discriminatory impact of apparently neutral policies.

Second, though the eligibility criteria is a 'provision, criteria or policy' of the local authority, it does not provide any clear and detailed information on how eligibility under the various bands is assessed. The Council has adopted the FACS Guidelines for assessing eligibility but this does not provide clear points at which it is indicated a persons needs could be classified as critical or substantial. Provisions such as this have the potential to be discriminatory under the Equality Act 2010 (whether intentional or unintentional) in that they may be relied upon to justify unnecessarily a refusal to meet the assessed needs of

a person with a disability which may have the effect of impeding his or her integration into the society.

Discrimination here includes both direct and indirect discrimination. Direct discrimination involves straightforward cases of direct and intentional discrimination against a person with a disability motivated primarily by prejudice such as when a local authority arbitrarily refuses to acknowledge that someone with a disability meets the eligibility criteria the authority has itself set. However, the recent case of *R (Elaine McDonald) v London Borough of Chelsea RBC*<sup>439</sup> demonstrates that much of the discrimination against persons with a disability in the provision of welfare services to meet their disability related needs are not generally motivated by malice or forethought but arises from an entrenched reluctance on the part of local authorities to depart from established patterns of service delivery. The effect of such discrimination could be devastating and the reach of the duty on public authorities to promote equality may be crucial in combating this form of discrimination.

Third, the requirement under the statutory duty on equality to conduct a proper equality impact assessment of a local authority's eligibility criteria may be crucial in ensuring that certain groups of persons with a particular disability are not disadvantaged by a local authority's application of its eligibility criteria. In *R (on the application of AM) v. Birmingham City Council*,<sup>440</sup> the failure of the local authority to carry out a proper equality impact assessment was central to the court's decision to hold that the proposed changes to the authority's eligibility criteria was unlawful. The court in fact doubted whether the local authority's decision to terminate funding for needs assessed as substantial rather than critical could be said to have discharged its duty to give due regard to the promotion of equality for persons with a disability without some attempt at assessment of the practical impact on those whose needs in a particular respect fell into the "substantial" band but not into the "critical" band.

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<sup>439</sup> [2010] EWCA Civ 1109; [2011] UKSC 33(UKSC2011/0005).

<sup>440</sup> [\[2009\] EWHC 688 \(Admin\)](#)

Fourth, a general appraisal of a decision to cease funding for a particular category of persons with a disability will not suffice to discharge a local authority of its duty to give due regard to the promotion of disability equality. In *R (Baker) v Secretary of State for Communities and Local Government*<sup>441</sup> And confirmed by the Supreme Court in the Elaine McDonald case It was held that “due regard” means “appropriate in all the circumstances.’ The duty to promote disability equality goes beyond simply giving consideration to how to address the needs of persons with disabilities and requires local authorities to consider the impact of a proposed decision and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality. In this respect, the Court of Appeal stated in the Birmingham case<sup>442</sup> that the decision of the local authority to consult "on broad options" required consideration of a subsidiary question whether to go beyond generalities in assessing the likely impact of the proposed course upon individuals with "substantial" needs. in order to pay "due regard" the Council when deciding to consult "on broad options" needed to consider whether its answer to the subsidiary question was consistent with its statutory duty to promote equality.

### **2.2.2 The Obligation to make Reasonable Adjustment**

The eligibility criteria and the requirement to assess the needs of persons with disabilities do not only provide a framework for clarity and legality in the provision of social and welfare services but also to promote equality of opportunity for this group of persons in the community. Promoting equality of opportunity for persons with disabilities will entail positively responding to the needs of an individual with a disability as a way of moving beyond respecting the difference of disability to making adjustments to accommodating it. Hence, the significance of the relationship between the system of need assessment and prioritisation and the duty to make reasonable adjustment.

The fact that the duty to make reasonable adjustment can arise in the provision of welfare services has been recognised by the European Charter of Fundamental Rights. The Appendix of the Revised Charter (which is stated to form an 'integral part' of the text) provides that 'a differential treatment based on an objective and reasonable justification shall

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<sup>441</sup> [2008] EWCA Civ 141; [2008] LGR 239.

<sup>442</sup> Ibid.

not be deemed to be discriminatory'. The Equality Act 2010, Section 29(7) places Public authorities under similar reasonable adjustment duty to that imposed on providers of services by section 29. Certain consequences flow from this with regard to the duty to assess and the eligibility criteria.

First, the system of need assessment and prioritisation through the eligibility criteria embody both the individual and group dimensions of the duty to make reasonable adjustment. The need assessment procedure and the eligibility criteria are designed in general terms applicable to all persons with disabilities and are therefore supposed to be anticipatory. the anticipatory nature of the section 29 duty requires that Southwark council scrutinises its policies on need assessment and its eligibility criteria in order to identify any disproportionate disadvantage they may cause to persons with disabilities. Furthermore, the duty creates a continuing obligation so that the assessment process and the eligibility criteria must be kept under continuing review so as to take in to account the changing circumstances of persons with disabilities. This is important because the introduction of new systems and technologies may create both fresh obstacles for this group of persons and new and innovative means of meeting their needs.

Second, even though the system of need assessment and prioritisation may have been designed with proxies for individual need in mind, they may over time become very detached from the actual needs of specific individuals with a disability. The role of the reactive dimension of the Section 29 reasonable adjustment duty in this context is to focus the attention of the authorities on the specific need of the individual with a disability. In this respect, it is noted that Southwark council has adopted a participatory approach to needs assessments Which places the individual with a disability at the heart of the whole assessment process and his wishes are taken in to consideration when decisions are made on how to meet his or her assessed needs. The assessment process is also an interactive one, involving not only the staff of Southwark council and the individual with a disability in need of support but also the professional social worker and individuals such as the carer of the person with a disability and the family doctor (GP) who have a close relationship with the person with a disability and interact with him or her much more regularly. These individuals together form a part of the autonomy of the individual with a disability and may thus have a

clearer idea of his or her needs.<sup>443</sup> Furthermore, the assessment process makes provisions for advocacy which is very important in the context of disability.<sup>444</sup>

### **2.2.3 The Concept of Social Well-being and Substantive Equality**

The eligibility criteria of Southwark council has been framed around three important action-points which provide the baseline for risk assessment and relate to the risks to the health, safety and independence of the individual with a disability. This could be linked to the substantive equality paradigm in three respects. First, these action-points encapsulate the means to the higher end of human freedom and choice. The enjoyment of the highest attainable standard of health has been affirmed in the World Health Organisation's (WHO) Constitution in 1946 as one of the fundamental rights of every human being. Health was defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.<sup>445</sup>

Second, the definition of health in terms of social wellbeing implies that factors enhancing and jeopardising the health of persons with disabilities reach far beyond their impairments. Access to employment, housing and leisure activities enhance individual health much more than medical interventions. This point is underscored by Article 15(3) of the European Charter on Fundamental Rights which not only Describe the positive actions to be implemented in fields such as housing, transport, telecommunications, cultural and leisure facilities but also insists that Such measures must not be pursued in isolation and should be programmed to complement each other, on a clear legislative basis. The implication here is that, in assessing the risk to the health of the individual with a disability, Southwark council must go beyond the individual's impairment and address issues relating to access to housing, transportation, education, employment and even leisure as it is not so much these rights that are at stake in isolation but the securing of their equal effective enjoyment to persons with disabilities.

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<sup>443</sup> See generally The Community Care Assessment Directions 2004, para 2(2) and (3).

<sup>444</sup> R. Banks, 'More than Law: Advocacy for Disability Rights' in M. Jones and L.A Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing 1999). pp343-386.

<sup>445</sup> For further information on WHO' see generally [www.who.int/mediacentre/news/notes/2003/np24/en/](http://www.who.int/mediacentre/news/notes/2003/np24/en/).

Third, an important dimension to social wellbeing is the psychological integrity of the individual in terms of the relationship he or she has with other members of the community. In its 1994 Green Paper on European Social Policy the European Commission pointed out that 'social segregation even with adequate income maintenance and special provision is contrary to human dignity and corrosive of social solidarity and community morale' In the context of disability.<sup>446</sup> In other words, to argue that persons with disabilities should be entitled to the provision of social and welfare support without ensuring their full integration in to the community bespeaks a thin and impoverished vision of equality. For as Quinn has pointed out, the 'poor law' approach of largesse and pity, even if lavishly funded, would no longer do unless linked to a rights-based program that respects and upholds the dignity of persons with disabilities as equal members of the community.<sup>447</sup> The Public Sector Equality duty certainly provides an opportunity for local authorities to reflect on how social provisions could be used to promote community cohesion.

## **2.3 Needs Prioritisation and Substantive Equality**

The foundational principle of the British welfare state, that the social and welfare needs of the most vulnerable in the community such as persons with disabilities should be met by the allocation of public resources has for some time been regarded by governments as no longer politically tenable or economically sustainable.<sup>448</sup> There is a potential for a clash between the polycentric decision-making functions of a local authority and its ability to promote the rights of persons with disabilities through the provision of care services to meet their disability-related specific needs.

### **2.3.1 Linking Assessed Needs to Resources**

The issue of costs is a central consideration in the ability of Southwark council to meet the care needs of persons with a disability. The council spends about 10million pounds annually on the provision of home care to adults and the need to control the escalating

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<sup>446</sup> Green Paper: European Social Policy—Options for the Union, COM (93)555, at 48.

<sup>447</sup> G. Quinn *supra* no. 42.

<sup>448</sup> M. Powell, 'Modernising the Welfare State' in M. Powell(ed), *Modernising the Welfare State* (The Policy Press 2008) pp1-18.

costs was the main reason why the council conducted a review of the eligibility criteria in October 2008.<sup>449</sup> In the same vein, there is a wide-spread perception that the Work Capacity reassessment forms part of the Government's spending reductions" and that the sole purpose of the exercise is to reduce benefit expenditure".<sup>450</sup>

Several important cases have explored the extent to which a local authority's resources or lack of them may be taken into account in the provision of welfare services to persons with disabilities. These cases demonstrate the extent to which courts continue to steer an uncertain course between willingness to challenge the failures of local authorities on one hand and concerns to minimise the funding predicaments of these authorities on the other. However, while a range of extraneous factors such as the likelihood of flood gates being opened, reprehensible conduct on the part of authorities and context sensitivity have influenced their conclusions, it is not certain the extent to which equality concerns have been factored in to these decisions.

Probably the most important case in this respect is *R v Gloucester County Council, ex parte Barry*<sup>451</sup> ( where the House of Lords established for the first time the principle that a local authority could take in to account its resources in deciding whether or not to meet the needs of its residents with a disability. In this case, the laundry and cleaning services of the claimant who was elderly and had a disability had been withdrawn on grounds that the local authority did not have sufficient resources to meet his needs. Despite the apparent mandatory force of Section 2(1) CSDPA, the House of Lords concluded that the local authority could take its own resources into account, both in the primary assessment of needs and subsequently in deciding whether it was necessary to make arrangements to meet the needs of a person with a disability. The approach in the Gloucester case was recently

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<sup>449</sup> Consultation on access to adult social care in Southwark, June 30-September 26 2008 available at <http://www.southwark.gov.uk/download/1741/consulation> document.

<sup>450</sup> There are over 2.5 million people on incapacity benefits and Employment and Support Allowance, constituting about 7% of the working age population in Britain with an annual cost to the taxpayer of around £13 billion. See generally *The Role of Incapacity Benefit Reassessment in Helping Claimants into Employment* - House of Commons, Work and Pensions Committee HC 1015, 26 July 2011. available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101502.htm>.

<sup>451</sup> *R v Gloucester, ex parte Barry* [1997] AC 584, [1998] 2 ALL ER 770.

followed by the Supreme Court in the Elaine McDonald case<sup>452</sup> where it was held that, in making the appropriate assessment of the claimant's needs under the social welfare legislation, the local authority was entitled to take into account, inter alia, its resources as a proportionate means of achieving a legitimate aim, namely the equitable allocation of limited care resources. The court also took in to account the Floodgate reasoning applied in the Gloucester case, pointing out that '...the cost of night-time care for Ms McDonald would be an ongoing liability in the amount of £22,000 a year, a figure which in theory would have to be available for all other clients in Ms McDonald's situation'.

The fact that resources could be central to the decision to meet the needs of persons with disabilities has been recognized by the ECtHR. In *Nikky Sentges v the Netherlands*,<sup>453</sup> the Court observed that the margin of appreciation granted to member states in the application of Article 8 ECHR is wider when the issues involve an assessment of the priorities in the context of the allocation of limited State resources. The court further pointed out that, in view of their familiarity with the welfare demands of citizens as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than the judiciary. *O'Reilly and others*.

However, it will not be in all cases that an authority's lack of resources will justify its failure to promote the fundamental rights of persons with disabilities. In *R v East Sussex County Council, ex parte Tandy*,<sup>454</sup> the House of Lords unanimously interpreted section 298 of the Education Act 1993 as giving rise to an absolute mandatory obligation on the local authority to deliver home tuition services to a child with a disability who had been unable to attend school for seven years. In *Autism-Europe v. France*,<sup>455</sup> the inadequate provision of resources was crucial in the finding by the Committee on the Implementation of the European Social Charter that France had failed to achieve sufficient progress in advancing the provision of education for persons with autism.

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<sup>452</sup> [2010] EWCA Civ 1109; [2011] UKSC 33(UKSC2011/0005).

<sup>453</sup> *Nikky v the Netherlands* (8 July 2003) Application no. 27677/02.

<sup>454</sup> *R v East Sussex CC ex Parte A and B* High Court (Admin) CO/4843/2001, 18 February 2003.

<sup>455</sup> Complaint No. 13/2002, 4 November 2003.



### 2.3.2 Prioritisation and the Test of Proportionality

The system of prioritisation involves targeting resources on meeting the needs of those who are in most need and entails a contextual assessment of the risk to the health, social wellbeing and independence of the individual in need of welfare support. Thus, to the extent that the prioritisation system involves taking in to account various contextual factors, it could be said that the local authority is applying a proportionality test which is at the heart of the duty to promote equality.

According to Lord Steyn in *R v Secretary of State for the Home Department, ex Parte Daly*,<sup>456</sup> 'proportionality is a new type of approach to Human Rights adjudication which subjects the justification for administrative decisions to rigorous scrutiny to determine their legality'. The ideals of equality and non-discrimination encapsulated in the Public sector equality duty could play a major corrective role in ensuring that the principle of proportionality is informed and not supplanted by the concept of rights by keeping the attention of local authorities focused on the disadvantaged position of persons with disabilities in the community, especially those whose welfare support services have been terminated under the rationalization program. In this respect, the Court of Appeal stated in the Birmingham Case that a local authority must consider all the options and rooms for manoeuvre with regards to its resources and a failure to do so may render unlawful any decision not to meet needs on the basis of lack of resources.

The location of the Public sector equality duty within the broad framework of Human Rights may indicate a willingness to establish a co-relation between social rights and the promotion of equality for persons with disabilities.<sup>457</sup> There are two linked implications of the social rights analysis on the principles of prioritisation and proportionality in the context of the ability of Southwark council to meet the welfare needs of its residents with disabilities on a substantive basis. First, the council will have to meet the welfare needs of persons with

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<sup>456</sup>[2001] UKHL 26, [2001] 2 WLR 1622

<sup>457</sup> S. Fredman, A Challenge to the Existing Anti-Discrimination Paradigm? supra no.8 pp 219-248.

disabilities only on a progressive basis, having regard to the available resources. Social rights are subject to progressive rather than immediate realisation.

Second, the concept of substantive equality could be linked to the requirement of a "minimum core" approach enunciated by the UN Committee on Economic, Social and Cultural rights which appears to dictate that the council should initially concentrate on the needs of those who are worst-off before moving on to other, less pressing, needs. This would mean that, in its budgetary and resource allocations, the council must give top priority to meeting the needs of persons with disabilities since, by whatever indicator, be it in housing, transportation, employment or education they are the worse off than other members of the community.

### **2.3.3 Needs Prioritisation and the Human Rights Act 1998**

The Human Rights Act 1998 now provide new terrain for persons with disabilities to challenge their treatment by local authorities, not only with regard to the assessment process that lies at the heart of the provision of welfare services but also with regard to the ways in which their lives have been affected by changes in the way welfare services are provided to meet their specific needs.

#### **2.3.3.1 Section 6 HRA and the Notion of Fair Access**

With regard to access to services, the provisions of section 6 of the HRA may provide a finely tuned vehicle to ensure that the assessment process operates to respect the human rights of persons with disabilities, especially with regard to the level of consultation that may be carried out by the local authority with the individual with a disability to identify his or her needs. The assessment process must be an interactive one and the local authority will have to identify carefully the specific needs of the person with a disability as failure to do so may amount to a breach of its statutory duty. Adjudicatory bodies including courts must obviously retain jurisdiction to review how the assessment of needs is conducted and should not automatically defer to the judgment of the local authority. Otherwise the protection afforded

by section 6 HRA will have little effect. In this respect, it was established in *Kirklees Metropolitan Borough Council ex parte Daykin*<sup>458</sup> that the court has an inherent jurisdiction to carry out an assessment of the needs of a claimant where there has been a failure on the part of the local authority to discharge its statutory duty to assess. However, such a jurisdiction does not exist where there has been an assessment or reassessment by the local authority and the courts will not substitute their assessment to that of the local authority.

### **2.3.3.2 The Article 8 ECHR**

The implications for persons with disabilities of the right to respect for one's private and family life, one's home and correspondence contained in Article 8 ECHR have already received some judicial scrutiny and are likely to continue to impact on the ability of local authorities to meet the needs of persons with disabilities. However, within the context of the provision of welfare services, the import of Article 8 to the promotion of equality for persons with disabilities was recently explored by the Supreme Court in *R (Elaine McDonald) v Kensington & Chelsea RBC*<sup>459</sup>

In this case, the appellant Ms McDonald suffered from a condition which required her to access a toilet three or more times a night. Owing to her physical frailty (caused as a result of a stroke), such access had resulted in a number of falls some of which had necessitated her hospitalization. The respondent local authority carried out a care plan review which concluded that Ms McDonald's night-time needs could be met appropriately by the provision of incontinence pads. Ms McDonald refused to use such pads on the basis that it offended against her dignity. On appeal from the Court of Appeal, one of the issues before the Supreme Court was whether the respondents' decision to provide pads interfere with the appellant's article 8 rights and, if so, whether such interference was justified and proportionate. The majority of the Supreme Court literally rubber-stamped the decision of the Court of Appeal dismissing Mrs. McDonald's appeal and concluded as follows with regard to the relationship between the provisions of Article 8 ECHR and the provision of welfare services. First, their Lordships affirmed that Article 8 in principle can impose a positive

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<sup>458</sup> [1998] 1 CCLR 512

<sup>459</sup> [2010] EWCA Civ 110; [2011] UKSC 33(UKSC2011/0005).

obligation on a state to take measures to provide home-based community care to a person with a disability but that such an obligation, however, would arise only where the applicant can establish both (i) “a direct and immediate link between the measures sought by an applicant and the latter’s private life”<sup>460</sup> paras 34 and 35 and (ii) “a special link between the situation complained of and the particular needs of [the applicant’s] private life.”<sup>461</sup>

There is now judicial authority for the proposition that the requirement of direct and immediate link will be established and thus Article 8 will be infringed where a local authority fails, unjustifiably, to provide a person with a disability with the support necessary to allow him or her to participate fully in the life of their family or where such failure undermines the dignity of the person with a disability.<sup>462</sup> In awarding substantial damages to the Bernards in respect of the infringement of their rights to a private and family life under Section 8 HRA, Sullivan J stated in *R (Bernard) v Enfield London Borough Council*<sup>463</sup> that the provision of Suitably adapted accommodation to the claimant’s family by the local authority would not merely have facilitated the normal incidence of the claimant’s family life but would also have secured her ‘physical and psychological integrity’. In *R v East Sussex CC ex parte A and B*,<sup>464</sup> Munby J *identified (human dignity)* as one of two particularly important concepts embraced by the notion of physical and psychological integrity. The second important concept was the right of persons with disabilities to participate in the life of their community and to have access to essential economic and social activities and to an appropriate range of recreational and cultural activities.

Second, the Supreme Court emphasised that even where such a direct and immediate link is found to exist, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and to the wide margin of appreciation enjoyed by member States with regard to the prioritisation or allocation of

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<sup>460</sup> *Botta v Italy* (1998) 26 EHRR 241.

<sup>461</sup> *Sentges v The Netherlands* (2003) 7 CCLR 400, 405.

<sup>462</sup> *R (Bernard) v Enfield LBC* [2002] EWHC (Admin) 2282.

<sup>463</sup> *Ibid.*

<sup>464</sup> High Court (Admin) CO/4843/2001, 18 February 2003.

limited State resources.<sup>465</sup> Their Lordships therefore agreed with the Court of Appeal's finding that the local authority's actions had taken in to account the dignity and autonomy of Mrs McDonald while striking the delicate balance between her safety, independence and privacy and the effect on the local authority's resources of the continuing liability of providing night-time care for her. Their Lordships concluded that the actions of the local authority with regard to the appellant's need assessment was justified as a proportionate means of achieving a legitimate aim, namely the equitable allocation of limited care resources.

Third, the Supreme Court expressly approved the position of Lord Woolf in *Anufrijeva v. Southwark London Borough Council*,<sup>466</sup> that the threshold of Article 8 is a high one, requiring that the hardship caused to the claimant by the failure to provide welfare support to meet the disability related needs should be comparable to that under Article 3 ECHR. In this respect, the learned Judge concluded that such a threshold would easily be attained where the welfare of children is at stake and that, in such instances, article 8 may require the provision of welfare support in a manner which requires family life to continue.<sup>467</sup> Another factor that would have to be taken into account in considering whether the threshold of article 8 has been reached is the extent of the culpability of the failure by the local authority to act and to the severity of the consequence of such a failure. In this respect, the Supreme Court endorsed the culpability test of Lord Wolf in *Anufrijeva*<sup>468</sup> when it concluded that the local authority could not be held liable because the breach of statutory duty was born of error rather than a lack of respect for Ms McDonald's Article 8 rights and the interference was not sufficiently serious.

It is humbly submitted that the Supreme Court decision in the Elaine McDonald Case deviates from the very notion of the right to equality for persons with disabilities. First, the decision appears to ignore the fact that the test of proportionality encapsulated in the

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<sup>465</sup> *Zehnalova and Zehnal v the Czech Republic* (2002) Application No.38621/97. Also, *O'Reilley v Ireland* (28 February 2002) Application No 54725/00; *Pentiacova v Moldova* (Application No 14462/03 (unreported)

<sup>466</sup> [\[2003\] EWCA Civ 1406](#), [\[2004\] QB 1124](#)

<sup>467</sup> *R (J) v. Enfield London Borough Council* [\[2002\] EWHC 735 \(Admin\)](#).

<sup>468</sup> [\[2003\] EWCA Civ 1406](#), [\[2004\] QB 1124](#)

Statutory duty to promote disability equality is a contextual one, requiring a careful balance of the policy of the local authority against the purpose sought to be achieved by the discriminating policy, and the extent to which the rights of a person with a disability in need of welfare support has been impaired. A key consideration in determining the extent to which a policy or practice impairs the rights of persons with disabilities will be the extent to which their dignity is upheld and respected. What must be remembered is the fact that, at a deep level the ideal of human rights encapsulated in the duty to promote equality is not merely about the intrinsic worth of each human being and their dignity; it is also about their equal inherent self-worth.<sup>469</sup>

Second, the decision will simply reinforce the current system of rationalization by compounding the isolation of persons with disabilities from the rest of the community and reducing their range of choice with regard to the services to meet their needs. Persons with disabilities are already being forced by the rationalisation system of Local Authorities to accept wholly inadequate care support packages under the threat of the support being terminated all together. There is no gainsaying that, for individuals such as Elaine McDonald, the choice between accepting care support which infringes their sense of self dignity or being refused totally any form of support is problematic. The idea that persons with disabilities should have minimal expectations of their needs being met appears to undermine the conceptual relationship between the provision of welfare services to meet the needs of persons with disabilities and the ideals of non-discrimination and equality which constitutes the very basis of the duty to promote equality for this group of citizens.

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<sup>469</sup> G. Quinn, *The European Social Charter* supra no. 421.

## Chapter Five: Mainstreaming, Partnership and the Promotion of Disability Equality

### Introduction

Mainstreaming has been conceptualised as a social justice approach to disability, based on the social model.<sup>470</sup> It gives effect to the right of equal treatment and non-discrimination by enhancing procedural rights to participation or consideration in the policy process. To the extent that it is a strategy for making the concerns and experiences of marginalised groups an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes, mainstreaming appears to encapsulate a substantive approach to equality and non-discrimination.<sup>471</sup> Its group dimension ensures that the focus is on the structures of an organisation that are likely to perpetuate group disadvantage rather than on individual acts of discrimination.<sup>472</sup> Mainstreaming is therefore a complex process of equality management which does not only focus on delivering measurable fixed outcomes but also on the quality of the decision-making process.<sup>473</sup> This chapter is concerned with the promotion of disability equality by Southwark council through mainstreaming and partnership within the framework of the Disability Equality Duty.<sup>474</sup>

### 1. Equality Management through Mainstreaming

One of the most effective ways of promoting disability equality through mainstreaming by an organisation is by systematically undertaking disability equality impact assessments and acting on

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<sup>470</sup> T. Rees, *Equality in the European Union Education, Training Labour Market Policies* (Routledge Publishers, London 1998); see also C. Foster 'Equality Mainstreaming: Turning Theory into Practice' (2002) 101 *Equal Opportunities Review* 9.

<sup>471</sup> Ibid. See also D. Mabbett, 'Why have disability categories in social security?' *supra* no.401 pp 163-8.

<sup>472</sup> The DRC 'Practical Implementation of the Disability Equality within Local Authorities' Survey Report, 2006 Available at <<http://www.drc.gov.uk>> (Accessed February 2007). The DRC was dissolved in October 2007 together with the Commission for Racial Equality and the Equal Opportunity Commission to form the new Commission for Equality and Human Rights (CEHR).

<sup>473</sup> O'Reilly v Ireland (28 February 2002) Application No 54725/00 ECJ. Also, see generally C. O'Conneide, 'A New Generation of Equality Legislation? Positive Duties and Disability Rights' in A Lawson and C Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, (Hart Publishing 2005). P. 219-248. *Elias v Secretary of States*

<sup>474</sup> Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) Reg.2(C)(b).

their findings.<sup>475</sup> The conduct of equality impact assessments provides a managerial framework for integrating the social constructionist approach to disability encapsulated in the social model and the legal approach of anti-discrimination law. The social constructionist approach to disability is aimed at uncovering the subtle institutional and societal factors which interplay with personal experiences to create, reinforce and perpetuate the discrimination against persons with disabilities.<sup>476</sup> The legal approach is essentially a formal equality approach to discrimination where equal treatment is required of equal cases. What the legal approach fails to take into account is the fact that there may be material differences between persons with disabilities and persons without so that, without more substantive action, real equality may not be attained. Mainstreaming through the conduct of equality impact assessments involves ‘taking an active attitude to dismantling the obstacles which stand in the way of equality.’<sup>477</sup> A substantive equality approach is more likely to take account of the realities of disability discrimination and attempt to dismantle the barriers that may stand on the way to real equality for persons with disabilities.

## 1.1 The Corporate Framework for Mainstreaming Equality and Human Rights

Prior to the introduction of the statutory duty on disability equality, Southwark council like most other local authorities in the UK implemented some form of equality impact assessments or mainstreaming of their policies and function. These were carried out as a part of the monitoring and evaluation exercise required by the Audit Commission and the Equality Framework for Local Government.<sup>478</sup> These non-judicial auditing mechanisms complement the enforcement of the statutory duty to promote equality by ensuring an adequate focus upon compliance and have contributed in defining the current corporate framework for the conduct of equality impact assessments by Southwark council.

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<sup>475</sup> DED-DRC Code of Practice England and Wales para 2.49. See also S Witcher, ‘Mainstreaming Equality: The Implication for Disabled People’ (2005) Vol. 4 (1); p. 55 – 64.

<sup>476</sup> M. Jones and L.A Basser Marks, ‘Law and the Social Construction of Disability’ in M Jones and A Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing, 1999).P.1-24.

<sup>477</sup> C. O’Cinneide’ A New Generation...’ supra no. 2. p. 219-248.

<sup>478</sup> For a detailed account on this policy and practices, see Southwark Council, ‘An Independent Review on the Equality and Diversity Framework of Southwark council’ (Lord H Ouseley Report) 2005, p.3 available at [www.southwark.gov.uk/download/434/equalitiescheme](http://www.southwark.gov.uk/download/434/equalitiescheme).



A crucial difference between mainstreaming under the statutory duty to promote equality and the mainstreaming initiatives under the Equality Standard and the Audit Commission's framework is that, unlike the latter, the statutory duty is legally binding and is intended to have real bite when conflicting organisational priorities, or lack of internal political will, might otherwise relegate equality to a subsidiary concern.<sup>479</sup> In fact, since the introduction of the statutory duty to promote disability equality, Southwark council has demonstrated a sustained determination to conduct equality impact assessments with over 148 such assessments having been carried out by September 2010. It may be the case that the binding nature of the duty is an important element in ensuring a degree of sustainability and internal political commitment by organisations subject to the duty.

### **1.1.1 The Equality Standard for Local Government**

The Equality Standard for Local Government was introduced in 2001 as a Performance management framework for combating institutional discrimination resulting from organisational processes, systems and culture.<sup>480</sup> Its focus is on equality mainstreaming in service provision and employment and covers all the equality strands, including Asylum seekers and Gypsies. The Standard is based on a graduated 5-levels evaluation framework, with the level 5 being the highest and level 1 being the lowest. Southwark council is currently on level 3 and has been awarded the Equality Mark for Local Government, indicating a successful validation of the organisation's existing systems and processes for mainstreaming equality. The council is expected to undergo a systematic validation every three years.

### **1.1.2 The Audit Commission's Comprehensive Performance Assessments**

Like the Equality Standard, the comprehensive performance assessments (CAP) conducted by the Audit Commission on local authorities constitutes a form of non-judicial accountability mechanism which operates to ensure an adequate focus on

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<sup>479</sup> C. O'Cinneide *supra* no. 2. Also see, C.McCruden, 'Review of Issues Concerning the Operation of the Equality Duty' *supra* no.143.

<sup>480</sup> The Equality Standard for Local Government May 2007 available at <http://www.idea.gov.uk/idk/aio/6414524>.

equality issues by local authorities.<sup>481</sup> The commission's Performance management framework (PMF) comprises a number of indicators' which could show progress towards fair participation and fair access, across all the equality grounds, over a specific time period.

### **1.1.3 The Race Relations Act 1976**

The most important inspiration for the conduct of equality impact assessments on disability by Southwark council appears to have come from the council's conduct of equality impact assessments under the provisions of section 71 of the Race Relations Amendment Act 2000. The statutory duty on disability equality was 'intended to mirror and have equivalent weight' to the RRA 2000. Passed in the wake of the McPherson report<sup>482</sup> which criticised institutional racism in the police force, the Act aimed at mainstreaming racial equality by making the promotion of equality of opportunity and good race relations an integral part of the way public functions are carried out.

The DED was introduced after Southwark council had already developed systems, processes and procedures for the conduct of race equality impact assessments under the requirements of section 71, Race Relations Act, 2000. Following the Lord Ouseley's report in 2005, a decision was taken by the council that equality impact assessments be conducted on all the equality strands, including disability. Thus, by the time the DED was introduced in 2006, Southwark council did not only already have in place structures, systems, processes and procedures for the conduct of equality impact assessments but, most importantly had demonstrated the necessary political will to implement an equality agenda for persons with disabilities.

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<sup>481</sup> Audit Commission, *Equality and Diversity: Learning from Audit, Inspection and Research* (London, Audit Commission, May 2002) available at <http://www.audit-commission.gov.uk/nationalstudies/localgov/Pages/equalityanddiversity.aspx>.

Home Office, The Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny.CM4262-I 1998.

### **1.1.4 The Role of the Human Rights Act 1998 and the Commission for Equality and Human Rights**

Mainstreaming equality in the London Borough of Southwark is intricately linked to that of human rights embodied in the Human Rights Act 1998. This fact is reflected both in the council's Sustainable Community Strategy (The Southwark 2016)<sup>483</sup> and the Equality and Human Rights Scheme 2008-2011 which provide the strategic vision for the conduct of impact assessments by Southwark council. This position is reinforced by the tendency of the staff of the council to equate equality discourses with human rights discourses, a tendency which resonates positively with the government's 'modernisation agenda' of the public service encapsulated in the 'human rights culture'.<sup>484</sup> The link between the conduct of equality impact assessments and human rights operates to ensure that the exercise is firmly grounded on the fundamental rights of persons with disabilities and not subject to political and administrative discretion.<sup>485</sup> Furthermore, the Equality Act 2006 granted the Equality and Human Rights Commission the power to assess the level to which a public authority is complying with the statutory duty and to make recommendations as to improvements.<sup>486</sup>

### **1.2 The Operational Framework of Impact Assessment as a Bureaucratic Exercise**

Two approaches to equality impact assessments have been identified in this study; the expert-bureaucratic model and the participatory-deliberative model.<sup>487</sup> Under the expert-bureaucratic model, the conduct of equality impact assessments is regarded as a technical exercise to be performed by bureaucrats or equality experts with specialised training as well as a sophisticated understanding of equality issues. Under the alternative participatory-

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<sup>483</sup> Southwark Sustainable Community Strategy (SCS) available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>484</sup> S. Spencer, 'Partner Rediscovered: Human Rights and Equality in the UK' in C. Harvey(ed), *Human Rights in the Community: Rights as Agents of Change*, (Oregon, and Hart Publishing 2005). P. 29-42.

<sup>485</sup> According to Professor Fredman, one of the main weaknesses of the proactive model of anti-discrimination is its vulnerability to political discretion; S. Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' *supra* no.43 p.41.

<sup>486</sup> Equality Act 2006 Sections 31 and 32. The failure of an authority to respond appropriately to such a notice entitles the Commission to apply to the courts for an order of requiring compliance.

<sup>487</sup> F. Beveridge, S. Nott, K. Stephen, 'Mainstreaming and the engendering of policy-making: a means to an end?' *EPP* 7 2000, 3, pp 385-405.

deliberative model, individuals and other stakeholders outside the organisation are encouraged to contribute to the conduct of equality impact assessments. This study found that the participatory-deliberative model promotes the participation in and provide access to policy-making by external stakeholders.<sup>488</sup> It also emphasises the accountability of professionals and officials. The DED adopts a reflexive approach to regulation which encourages public bodies to consult on and integrate the perspectives of persons with disabilities into the development and implementation of policies.<sup>489</sup>

### **1.2.1 Departmental Impact Assessments**

The conduct of equality impact assessments in Southwark council is primarily and largely a bureaucratic exercise conducted by the departmental staff of the council who are not only responsible for the design, development and implementation of policies in their relevant service areas but are also assumed to possess the relevant expertise and professional skills to perform such an exercise. The bureaucratic approach, referred to by Habermas<sup>490</sup> as the 'scientisation of politics' is not only underpinned by a 'technocratic' conception of liberal democracy, according to which all significant public decision-making is a matter of technical discussion best left to experts and relevant professionals but also constitute the framework for the rational-critical public debate which provide the normative legitimacy of the equality impact assessments.

A strict adherence to the bureaucratic approach has the potential not only to perpetuate paternalistic decision-making which undermines the autonomy and dignity of persons with disabilities but may also be incompatible with the approach to substantive equality. However, the requirement under the DED to involve persons with disabilities in the process of policy formulation and implementation may reflect a desire to infuse the bureaucratic approach with an element of substantive equality as it recognises the fact that the staff of our public authorities may not be able to identify and prioritise disability equality initiatives effectively

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<sup>488</sup> C. McCrudden, 'Review of issues Concerning the Operationalisation of the Equality Duty' *supra* no.150.

<sup>489</sup> C. McCrudden, 'Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's' Consultation Paper Vol 36 ILJ. P 255-266.

<sup>490</sup> J. Habermas, *Between Facts and Norms*, (Cambridge, Polity Press 2010) pp1-41.

unless they consider the views of persons with disabilities and other stakeholders outside the bureaucracy.<sup>491</sup>

There are two ways by which Southwark council has attempted to limit bureaucratic discretion and thus promote the rights of persons with disabilities in the conduct of equality impact assessments by the staff of the council. First, the council has appointed a lead corporate officer within the department of Law and Democratisation whose remit includes the management of the equality impact assessments process. This includes the coordination of the various departmental EQIAs, working closely with those responsible for delivering the service or policy areas. As the main department charged with the implementation of the equality duty, the department of Law and Democratisation of Southwark council operates to ensure effective coordination and sustainability of the duty. This is particularly relevant when one considers the fact that, in the face of the current financial squeeze, some departmental managers may attempt to side track equality issues as not important.

Second, Southwark council has developed a well defined system of carrying out EQIAS applicable to all the equality strands and which is expected to be followed by the staff of the council at all times when carrying out an EQIAS.<sup>492</sup> The council's Guidelines on the Conduct of EQIAs is an important instrument not only for strengthening the organisation's capacity to conduct equality impact assessments but most importantly for promoting the ideals of non-discrimination and equality by controlling the exercise of discretion by the staff of the council.<sup>493</sup> The systematic and clear stages are likely to ensure that the scrutiny of policies and practices by the departmental staff is detail and thus likely to uncover those hidden or subtle discriminatory practices that are the hallmark of indirect discrimination.

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<sup>491</sup> DED-DRC Code of Practice England and Wales para 2.52

<sup>492</sup> Southwark Equality and Human Rights Scheme 2008-11 Annex 4: An Introduction to Planning and Carrying Out your Equality Impact Assessment.

<sup>493</sup> R. E. Gooding, 'Welfare, Rights and Discretion' Vol.6 *OJL* 1986. P 230.

The development of detailed rules and guidance to be followed by the staff of the council in carrying out the equality impact assessments also provide the essential rationality for the normative legitimacy of the process. Consistency is vital for transparency and accountability. This point was emphasised by Lord Moses when he stated that ‘Good administration and fairness demands that a local authority is only entitled to depart from its own policy where to do so represent a proportionate response to the circumstances which led it to consider such a departure.’<sup>494</sup> Adherence to the Guidelines’ may assist the local authority faced with a claim of indirect discrimination or judicial review for failure to comply with its general duty by demonstrating that it had considered all the equality implications of a policy or function.

### **1.2.2 The Community Impact Statements**

An important dimension of the Southwark Equality Impact Assessment process which has the potential of ensuring a link between the council’s policies and substantive equality within the context of the wider community in which they operate is the Community Impact Assessment statements that are prepared by the Community Engagement Unit of the council and submitted to the council’s executive on a regular basis. The statements provide a framework for the council to routinely assess the impact in equality terms of policies and outreach programs designed to promote community cohesion and democratisation. As a bureaucratic exercise, compliance with the requirement to produce the Community Statements may provide the council with an opportunity to link up the promotion of community cohesion to achieving substantive equality for its residents. In a way, this demonstrates that the scope for positive action through bureaucratic routines could be used to enhance an organisation’s compliance with the general and specific duties and thus be able to promote substantive equality for persons with disabilities.

The Community Councils are part of the decision making process of Southwark council and reflects its commitment to promote wider democratic and civic engagement to ensure

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<sup>494</sup>R( Kaur & Shah), v London Borough of Ealing & Anor [2008] EWHC 2062 (Admin) (29 July 2008) available at URL: <http://www.bailii.org/ew/cases>.

legitimacy and accountability for the council's work. Their relevance could be situated and plugged to the substantive equality paradigm from two levels; first, the eight community councils currently existing in the London Borough of Southwark are forums for public participation and a focal point for discussion on local matters, including equality. Second, the existence of the Community councils evidences the innately democratising effect of the equality shifts within the council. Local Councillors elected to represent the area sit on the community councils and take decisions relating to key areas that affect the lives of the residents. This may indicate not only that legal and political discourse about equality are moving in a similar direction to management thinking within the council but also an important cultural shift that equality issues should be so visibly on the departmental Business Plan of the Community Involvement Unit of the council, let alone that this change should be viewed as a positive and welcome development Third, it was important for the study to recognise that, as deliberative structures the Community councils generate decisions that trace through to the mechanisms for promoting equality in the council and have help shape the conduct of equality impact assessments.

### **1.2.3 The Meeting of departmental Heads**

Southwark council has an inter-departmental working group of the council's top directors which constitute another layer of the bureaucratic approach to the conduct of equality impact assessments. Though the group's remit includes equality, its focus is not on disability equality. The group is important because it provides a forum where the top managers of the council could consider the equality implications of policies and make valuable inputs to the council's equality impact assessments. This point is crucial when it is considered that these directors are assumed to have a deep understanding of the council's equality agenda, which puts them in a good position to recognise obstacles and impediments to equality and to identify workable means of achieving change. The group also enables the directors to develop a joint-up approach to equality issues.<sup>495</sup>

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<sup>495</sup> According to the deputy director, Customer Services all the directors and sub directors of Southwark Council attend the meeting which is held on a monthly basis.

However, the fact that the group does not include representatives of community organisations or of the council's employees may indicate that there is no user input in to the decisions of the group. This may constitute an important weakness in the management structure of Southwark council in equality terms, especially when it is acknowledged that there is a significant trend towards statutory requirements to involve workers.<sup>496</sup> The requirements to involve and consult are intended to promote dialogue about crucial issues facing an organisation and to generate effective strategies for dealing with these issues.

#### **1.2.4 Sustainability**

A perennial concern with the proactive model encapsulated in the statutory duty to promote equality is that its dependency on political discretion and organisational capacity may render it susceptible to short-term political exigencies.<sup>497</sup> In other words, there is the practical possibility that positive measures programs designed to promote equality may lack sustained attention, and sufficient focus, upon disability issues. The challenge of implementing the duty is therefore to ensure that its enforceability by the Public body carries with it the weight and focus that is provided by a statutory duty.

Southwark council has developed two important corporate constitutional frameworks in order to ensure that the impact assessment process does not just become an exercise in procedure but one that is outcome-focused and sustainable over time and not amenable to changing political, financial or organisational circumstances. First, In order to ensure the constitutionality of the EQIAS process Southwark council provides that the process will be considered complete only when the action plan developed by the stages 1 and 2 Assessments is signed by the council's Individual Decision Maker (IDM).<sup>498</sup> An IDM is the relevant

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<sup>496</sup> EU Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community'.see also the Local Government and Public Health Act 2007 which propose an extension of scrutiny powers to hold other public bodies to account..

<sup>497</sup> S. Fredman, 'Transformation or Dilution....' Supra no. 43 p.41.

<sup>498</sup>Supra no.485.



executive member under whose portfolio the department carrying out the assessment falls.<sup>499</sup> The IDM is an important link in the impact assessment process because, as an elected officer he or she is able to bring the concerns and perspective of the residents represented to bear on the departmental action plans, thus increasing the capacity of the council to eliminate discrimination and promote equality for the residents. Also, by involving directly the political leadership of the council in the impact assessment process, Southwark council does not only ensure that the process has the political leadership but also the resources it requires to deliver the relevant outcomes.

Second, in order to ensure that the findings of the impact assessments are embedded in to the council's long term corporate plan, all actions identified in the stages 1 and 2 EQIAs are reflected in the relevant departmental business plan of action. This is an important mechanism of articulating managerial initiatives on equality to the council's corporate framework which is likely to ensure that the action points identified from the assessments do not become simply a tick box process but one that is based on actual outcomes. In fact, it is only through identifying issues of disability discrimination, finding solutions and taking remedial actions that substantive equality for persons with a disability could be achieved by our local authorities.

### **1.3 The Impact Assessment Procedure and Reports**

Southwark council initially had a three stage EQIA process but this was reviewed and reduced to two stages after the adoption of a new equality scheme for the organisation in 2008. The review eliminated from the EQIA process the general assessment and review of policies and functions (Screening Stage) which had been conducted by the council in 2006 to determine their relevance to disability equality as required by the DDA 2005 legislation. According to the social policy unit of the council which is responsible for the conduct of EQIAs, the review was necessary in order to streamline the process and reduce transactional costs.

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<sup>499</sup> The London Borough of Southwark is governed by a cabinet constituted of elected councillors. Each cabinet member is in charge of a number of administrative departments of the council which constitute's the cabinet's portfolio.

McCrudden<sup>500</sup> has pointed out that it would be both unrealistic and even divert scarce resources from being used to address the most substantial issues if impact assessments were required to be undertaken with respect to all policies and practices. Screening therefore permits public bodies to “screen out” those policies and practices which do not require a full impact assessment. However, screening may give rise to a situation where policies are (screened out) simply because an officer of the council thinks that the particular policy does not deserve to be equality impact assessed.

According to the council’s guide on the conduct of equality impact assessment, there are 2 stages in carrying out an EQIAS by the staff of the council: the stage one and stage two impact assessments. Two points could be extrapolated from this framework which could deepen our understanding of equality mainstreaming by a local authority with a diverse population. First, the two stages of the impact assessment process are infused with inputs and contributions from persons with disabilities or their representative organisations. The requirement to involve persons with disabilities or their representatives in the conduct of impact assessments represents a significant challenge to the council as it does not only make the role of inclusive deliberation particularly central to the process but also transforms mainstreaming from a bureaucratic exercise to an institutional manifestation of deliberative democracy.<sup>501</sup>

Second, the requirement to mainstream equality give rise to new theoretical and practical challenges in that they staff of the council are not only required to address an increasingly complex range of equality groups but are also required to engage with ‘equality and human rights.’<sup>502</sup> A linked effect of this challenge is that prioritising is an inevitable feature of mainstreaming and that the conduct of equality impact assessments may provide an innovative mechanism for integrating a local authority’s processes for identifying

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<sup>500</sup> C. McCrudden, ‘Review of Issues Concerning the Operationalisation.....’ supra no.150.

<sup>501</sup> J Squires, *Equality and Diversity: A New Equality Framework for Britain?* School of Public Policy, UCL, London, 2003. Available at [http://scholar.google.com/scholar?cluster=1767070983990723274&hl=en&as\\_sdt=0,5](http://scholar.google.com/scholar?cluster=1767070983990723274&hl=en&as_sdt=0,5).

<sup>502</sup> The protected characteristics under the Equality Act 2010 are; Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

equality priorities with meeting its statutory duty to involve and consult with persons with disabilities.

### **1.3.1 The Stage One Impact Assessment Report**

The Stage one equality impact assessment entails a close scrutiny of the relevant policies by the staff of the council, identifying equality gaps and proposing appropriate measures to deal with any identified adverse impact. The Stage one impact assessment is most crucial to the ability of the council to tackle discrimination as it is at this level that the individual staff are expected to demonstrate the relevant competence to uncover the subtleties of disability discrimination. There were three aspects of the stage one assessments that may support a proposition that the process is capable of delivering real and substantive equality outcomes not only for persons with disabilities but also for the other equality strands.

First, it was evident to this study that most of the reports of the stage one assessment were written and presented to the EDP by senior staff of the council, often of or above the position of Officers who should have undergone the council's competency training on disability awareness and thus could be assumed to possess the relevant skills and competence to deal with the intricacies of disability equality.<sup>503</sup> However, this research noted that most of the reports to the Equality and Diversity Panel did not reveal any analysis of the effects of multiple discrimination but simply focussed on the equality impact of policies and practice on the different equality strands.<sup>504</sup> This may indicate a gap in the council's equality training which needs to be addressed if the staff are to be able to demonstrate an ability to deal comprehensively with issues of unlawful discrimination. Given the complexity of the single Equality Act, it is important that council staff engaged with equality impact assessments should be fully conversant with the provisions of the Act. This would enable managerial initiatives on equality to be linked to the current anti-discrimination

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<sup>503</sup> The equality competency training is mandatory to all staff from or above the position of manager. The training is conducted as part of the competency requirements under the Equality Standard for local government.

<sup>504</sup> The researcher attended the meetings of the Southwark Equality and Diversity Panel (EDP) between November 2008-November 2009 and witnessed the presentation of the stage 1 and 2 report by the staff of the council. For an analysis of multiple discrimination, see generally S. Hannett, 'Equality at the Intersections: the Legislative and Judicial Failure to Tackle Multiple Discrimination' Vol.23 No. 1 *OJLS* 2003. PP.65-86. Also, for the intersection between Disability and Age, see S. Hannett, 'Equality at the Intersections: the Legislative and Judicial Failure to Tackle Multiple Discrimination' Vol.23 No. 1 *OJLS* 2003. PP.65-86.

framework and thus minimise the possibility of the council's equality strategies being derailed by claims of unlawful discrimination.

Second, it was clear from the reports of the stage one assessments that there is a greater use of evidence, both qualitative and quantitative in the conduct of impact assessments by the staff of the council in order to identify any negative or positive impacts of the policies and how the negative impacts could be mitigated while the positive ones improved upon. The use of evidence in the conduct of impact assessments is a central requirement of the Specific duty and its importance is emphasised in the Southwark council's Guide to carrying out impact assessments which stresses the need of obtaining baseline evidence on discrimination and equality across all the functions of the council. This is an important feature of the conduct of equality impact assessments by the staff of Southwark council, not least because it enables the staff to avoid wasting time developing equality initiatives which are outdated and irrelevant to the circumstances of persons with disabilities. Also, the council's arrangements for conducting impact assessments might be used to manage the constant technological changes that may potentially disadvantage persons with disabilities with regards to the delivery of services. This would counteract a merely reactive stance to the council's duty to make reasonable adjustments and thus better plug it to the substantive equality paradigm.

Third, the depth of knowledge exhibited in the reports and the skill and care with which they were prepared differed between the staff. This may indicate the different degrees of staff competency and seriousness applied by the staff to the conduct of impact assessments and the preparation of the reports to the EDP. The conduct of impact assessments is a legal duty which must be performed conscientiously and with the relevant degree of seriousness if the council is to avoid its policies being challenged through lengthy and costly judicial review process.<sup>505</sup> Mainstreaming equality is not only about delivering equality outcomes but is also about the quality of the decision-making process. A stage 1 report to the EDP is mandatory where the particular service is rated as medium or high.

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<sup>505</sup> R (Chavda) v Harrow LBC [2007] EWHC 3064 (Admin); R v Birmingham City Council and M, G and H v Birmingham City Council (co-joint appeals) Neutral Citation Number: [2011] EWHC 1147 (Admin).

### 1.3.2 The Stage Two Impact Assessment Report

The second stage in the Southwark EQIAS process involves building on the stage 1 outcomes, including any feedback from the EDP and the development and implementation of an action plan to address the various equality gaps identified in the relevant policy or function.<sup>506</sup> This research studied some stage 2 impact assessment reports and witnessed their presentation to the EDP by the staff of the council. Some interesting data emerged from the study which may be important in establishing the link between the conduct of EQIAs and the delivery of substantive equality for persons with a disability by Southwark council. First, the stage 2 reports were much more detailed, contained more information and at times the evidence used were more robust. This may indicate that the two stage assessment process enables the staff to improve on the depth and scope of the scrutiny of the council's policies and to incorporate any relevant suggestions of the EDP in to their report. Such a high degree of scrutiny could only be beneficial rather than detrimental to the council's agenda to eliminate discrimination and promote disability equality.

Second, a recurrent problem with the stage 2 assessment was the frequent failure of the staff of the council to present their reports on the days allocated to them by the social policy officers who are charged with coordinating the EDP. The reason often advanced by the failing officers was that they were caught up by other more important official duties, indicating that issues of equality may be considered as less important than other duties of the council. Since the stage 2 report to the EDP are not mandatory, compliance was usually voluntary. This means that the stage 2 reports were likely to be presented to the EDP for independent scrutiny only when the work schedule of the presenting officer permits and there is the necessary individual goodwill. In the absence of these conditions, stage 2 reports to the EDP tended, at best, to be sporadic and, at worst, not to take place at all.

Third, a persistent complain of the EDP panellists was that they were not given the opportunity to know if their contributions to the stage two staff impact assessments reports were taken on board because there were no arrangements to ensure that the panel

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<sup>506</sup> See generally Equalities Scheme 2005-08, Annex 4 supra no.485

is informed of any actions after the stage two reports are presented by the staff.<sup>507</sup> This may indicate a frustration with a process which is not only supposed to be inclusive but also accountable and transparent. The requirement of participation and the demands for more transparency and accountability could be seen as outcomes of a regulatory framework which seeks to empower the marginalised and disadvantaged in the community with regard to the way services are delivered and decisions are made. Yet, the relationship between the demand for more transparency and accountability on the one hand and the empowerment of persons with disabilities through participation on the other might not be one of cause and effect but are both outcomes of the shift in the balance of trust between the professionals of our public authorities and persons with disabilities. In this respect, the concept of participatory empowerment may itself be the solution to problems of transparency and accountability that are associated with our public authorities.<sup>508</sup>

### **1.3.3 Impact Assessments as Organisational Learning and Development**

An important data that emerged from this study which could demonstrate the ability of the Southwark EQIAs process to deliver substantive equality is the fact that it is a continuing process of organisational learning and development. Organisational learning is conceived as a transformational process which seeks to help organisations develop and use knowledge to change and improve themselves on an on-going basis.<sup>509</sup> Three levels of learning may occur in an organisation;

- Level one looks at how to improve the status quo and involves incremental change which narrows the gap desired and actual outcomes.

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<sup>507</sup> Staff EQIAs reports are usually emailed to the Panellists by the Social Policy Unit of the council at least one week before the date of the panel meeting. The reports were also sent to the researcher during the period he observed the panel meetings.

<sup>508</sup> M. Lodge, 'Accountability and Transparency in Regulation' *supra* no.178 pp124-144.

<sup>509</sup> V. Iles and K. Sutherland, 'Managing Change in the NHS, Organisational Change: A Review for Health Care managers, Professionals and Researchers' available at [http://www.comorbidity.org.au/sites/www.comorbidity.org.au/files/Managing\\_ChangeintheNHS.pdf](http://www.comorbidity.org.au/sites/www.comorbidity.org.au/files/Managing_ChangeintheNHS.pdf). Also, see P. Tarpett and L. McMahon, 'Managing Organisational Change: a Management Workbook' (OPM) ISBN: 9781898531 7 available at [www.opm.co.uk](http://www.opm.co.uk).

- Level two is aimed at changing the status quo, at how to change the existing assumptions and conditions within which level one operates. This can lead to transformational change.
- Learning at level three is about learning how to learn: this learning is directed at the learning process itself and seeks to improve level one and level two learning.

The two-stage equality impact assessment process adopted by Southwark council is important because it provide structure to a learning process that encourages and enhances the participation of employees and other stakeholders in developing pluralistic solutions to equality management. This is the hallmark of a learning organisation. This research was informed by an official of the housing department of the council that whenever there was a new development in the council concerning disability which she did not understand, she often conducted an informal consultation by phone with residents with disabilities and the evidence obtained could be fed in to her work. It may be the case that it is such forms of organisational learning that are vital in developing the awareness of disability discrimination amongst public officials as it emphasises the importance of developing good relations between the officials and the disability community. It also enable due regard to be given, on a continued basis, to changing social norms, practices and expectations which disadvantage persons with disabilities. The legislation provide that the public body must carry out extensive consultations involving interested persons but it is the developing of this continuing learning process that may provide the real advancement in the fight against disability discrimination in our public services. For as one manager of Southwark council pointed out, .....*there is more potential in increasing disability awareness by staff interacting with the disabled community than in any disability awareness training that may be available.*<sup>510</sup>

## **2 Mainstreaming as Participatory-Deliberative Democracy**

In addition and in complement with the bureaucratic model, Southwark council has adopted a participatory/deliberative approach to the conduct of equality impact assessments. The participatory/deliberative approach involves the participation of external experts from community forums and organisations within the borough with an interest in equality and diversity in the conduct of the EQIAs process. Professor Fredman has pointed out that

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<sup>510</sup> Interview conducted on 16/07/2010.

participation as a mechanism of scrutiny and review could be seen as a means to deepen the democratic legitimacy and reach of equality by incorporating civil society or relevant stakeholders into both the process of norm setting and its implementation.<sup>511</sup>

## 2.1 Participation and the Conceptualisation of Democracy

The link between the participation of persons with disabilities in the conduct of equality impact assessments and the ideals of equality and non-discrimination could be understood in the light of theoretical insights into what Maurice Roche refers to as *social citizenship* in the liberal democratic state.<sup>512</sup> Citizenship is one of the central organising features of our contemporary democracy and provide a way of conceptualising the relationship between the individual and the social, especially the state. It provides a basis for the way in which individuals can understand their relationship to other members of the community, articulate their expectations and entitlements, and organise in concert with others to act strategically and politically.<sup>513</sup>

According to Marshall's orthodoxy,<sup>514</sup> citizenship is constituted of civil, political and social rights, as expressed through corresponding social institutions. By according individuals social, political and civil rights, citizenship does not only grant individuals a right of inclusion and participation within the society but also provide them with a strategic weapon capable of holding democratic governments to account. Professor Quinn has pointed out that 'the slide toward totalitarianism usually begins with discrimination against unpopular groups or causes.) and that (If left unchecked such an impulse toward exclusion and discrimination leads to a closure of political and civil space and ultimately to the implosion of the political order.'<sup>515</sup>

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<sup>511</sup> S Fredman, 'Changing the Norm: supra no.163 p145.

<sup>512</sup> M. Roche, *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society* (Cambridge, Polity Press 1992).

<sup>513</sup> Ibid. See also L. Davis, 'Riding with the Man on the Escalator: Citizenship and Disability' in M. Jones and A. Basser Marks (Eds), *Disability, Divers-ability and Legal Change.*( Cambridge, Kluwer Publishing 1999). Pp65-74.

<sup>514</sup> T.H Marshall, 'Citizenship and Social Class' (London, Heinemann 1963).

<sup>515</sup> G Quinn 'The European Social Charter supra no.42 pp 279-304



### 2.1.1 Participation and the Notion of Equal Citizenship

A key assumption of mainstreaming is the recognition that not only is the concept of citizenship not neutral but also that inequality is rooted in changing and changeable social structures, particularly those of domination and oppression which systematically exclude some group of citizens such as persons with a disability from participating fully in the society as equal citizens.

The disability equality duty is based on recognition that persons with a disability have been particularly affected by exclusion from decision making processes, resulting in the neglect and or lack of understanding of their specific needs.<sup>516</sup> The participatory approach to mainstreaming adopted by Southwark council may be linked to a (Equal Citizenship) approach to disability equality which has a particular resonance with the substantive equality paradigm. The approach builds on Marshall's conceptualisation of citizenship and its egalitarian and integrative effects and implications. It perceives the participation of persons with a disability in the life of the community as a legitimate social right which involves an equality of membership status in the society.<sup>517</sup> In this respect, two conceptual consequences flow from the Citizen approach which could be aligned to the notion of substantive equality for persons with a disability. First, the approach underscores Dworkin's<sup>518</sup> distinction between treatment as equals and equal treatment that has been applied in the Human rights arena to distinguish between formal and substantive equality. Second, Local authorities which apply the Citizen approach could be considered as innovative.<sup>519</sup>

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<sup>516</sup> C. O'Cinneide 'A New Generation of Equality?' supra no.2. p. 222.

<sup>517</sup> See generally M. Roche, *Rethinking Citizenship...* supra no.512.

<sup>518</sup> R. Dworkin, *A Matter of Principle* supra no. 91.

<sup>519</sup> J. Squires, 'Negotiating Equality and Diversity in Britain: Towards a Differentiated Citizenship?' December 2007 Volume 10 Issue 4, [Critical Review of International Social and Political Philosophy](#), Pp. 531 – 559

### **2.1.2 Participation and the Duty to Make Reasonable Adjustment**

The concept of mainstreaming could be linked to the duty to make reasonable adjustment in two fundamental ways ; first, if mainstreaming is a mechanism for exercising the citizen's social rights, then persons with a disability must be given the support by the state to participate in the decision making process. This means that employers and service providers must take steps to ensure that their premises and services are accessible to persons with a disability without waiting for disadvantage to be experienced. Positive disability duties, therefore, complement reasonable adjustment duties and make sense in terms of theoretical approaches to the concept of equal citizenship. Such duties are designed to encourage a focus upon the social circumstances that generate disadvantage and can be regarded as an extension of the principle underlying 'reasonable adjustment' requirements.<sup>520</sup>

Second, the citizen approach reconceptualises the duty to make reasonable adjustment not just as an anti-discrimination measure but also as a Human rights issue which carries with it rights and obligations for persons with a disability. Thus, any adjustments for persons with a disability are viewed as essential to ensuring that this group of persons are able to participate fully in society as equal citizens. A linked effect of this is that persons with a disability will have to assume greater responsibilities to make a positive social and/or economic contribution to the society.

### **2.1.3 Empowerment and the Notion of Self-Development**

The conventional wisdom about citizenship, together with the dominant paradigm of social citizenship as expounded by Marshall has for generations been formulated around the discourse of rights. However, in order to understand fully the contributions persons with disabilities can make to the elimination of inequality through mainstreaming, it is crucial that the concept of social citizenship be understood not only in the language of

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<sup>520</sup> Roads v Central Trains Ltd [2004] (EWCA) Civ 1541; see also Archibald v Fife Council [2004] IRLR 197.

citizens' personal responsibility and social obligation but also in the discourse of duties and rights. In fact, *Roche* has argued that a new approach to social rights, which explicitly connects them with obligations and responsibilities, needs to be developed.<sup>521</sup>

Conventional discourse on disability rights have advocated the "empowerment" of welfare recipients by underpinning entitlements with rights to participate in the management and administration of services. Correspondingly, contemporary theories on social citizenship align the right of participation to the citizen's duty to self- develop, to develop one's talents and abilities and, to a lesser extent, to train in the art of public participation and representation and to use efficiently whatever opportunities and resources are available for the purpose of participation. In this respect, this study noted that The Southwark Alliance(SA ) which is the council's local strategic partnership provide support for the training of residents to be governors and Trustees and that members of the EDP are positively encouraged to undergo the relevant training as a part of their program of self-development.<sup>522</sup>

Conceptualising citizenship in terms of rights and duties resonates well with a human rights approach to disability which sees the participation of persons with a disability in policy formulation and implementation as a human rights value which the state should progressively promote. In this respect, participation is not just about the intrinsic worth of persons with disabilities and their dignity but is also about their equal inherent self-worth.

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<sup>521</sup> M. Roche, 'Rethinking Citizenship....' Supra.no. 512

<sup>522</sup> The Southwark Trustees Project (STeP) at CAS runs a free induction programme for new management committee members of Southwark Community and Voluntary organisations. This is open to new management committee members who have been on their committee for less than one year. For details, see [www.southwarkalliance.gov.uk](http://www.southwarkalliance.gov.uk).

## **2.2 The Equality and Diversity Panel (EDP)**

An important data that emerged from the study related to the EDP as an organisational structure that had been set up by Southwark council for the participation of external stakeholders in the EQIAs process. This data was important because it was within this context that the importance of group membership and the concept of equal citizenship especially emerged as a link to the substantive equality paradigm.

The Equality and Diversity Panel (EDP) is the main forum for the participation of persons with disabilities or their representative organisations in the conduct of equality impact assessments by Southwark council. Created in 2005 by the council to facilitate the participation of what Habermas call the Live world in the conduct of equality impact assessments, the panel is drawn from the various community forums and organisations with a focus on equality within the borough. The purpose of the panel is not only to scrutinise the policies and practices of the council but also to provide a critical-friend challenge to the views and perspectives of the council's bureaucracy on equality issues.

This researcher observed the meetings of the panel and conducted semi-structured interviews with some of the panellists in order to identify the legal issues arising from the participation of persons with disabilities and representatives of disability organisations in the discussions of the panel and their implications on the promotion of substantive equality for persons with disabilities. There were certain significant empirical data that emerged from the field work that could further our understanding of how the concept of participation is understood and applied by the authorities of Southwark council implementing the DED.

### **2.2.1 Participation and the concept of Group Representation**

A feature of the EDP which is capable of underscoring the participatory rights of persons with disabilities is its representative nature. The special representation of marginalised groups in deliberative structures does not only guarantee the equal participation of members of these groups but has been identified as an important enactment of political inclusion. This study noted the presence of persons with disabilities and members of their representative

organisations in the panel. Two representatives of Southwark Disability Forum and the Director of Southwark Disablement Association are members of the Panel, including the Director of the Organisation of Blind African Caribbean's. This gives persons with disabilities within the borough a strong representation in the Panel and an ideal leverage from which to influence the council's policies.

The concept of representation was analysed from two perspectives with regard to its relevance to the promotion of substantive equality for persons with disabilities. First, the concept could be linked to the conceptualisation of disability as a group identifying characteristic. the 'minority rights' paradigm holds that persons with disabilities are a social minority who have been systemically dominated, oppressed and discriminated against in all areas of life. The minority rights approach is underpinned by the notion of "identity politics". Identity politics is founded on a concept of human difference which assumes that persons with disabilities have some set of common attributes of interests which can only be represented by persons with disabilities themselves. The implication here is that persons without disabilities cannot be said properly to represent the interests of persons with disabilities.<sup>523</sup>

Second, it was important to recognise that the DED does not restrict the involvement or participation to persons with disabilities but includes all those persons who may have an interest in promoting the rights of persons with disabilities. In this respect, Young has conceptualised representation not in terms of identity but difference and defines the concept as a differentiated relationship among political actors engaged in a process extending over space and time.<sup>524</sup> The current membership of the panel includes representatives of organisations representing almost all the equality strands, including Human Rights organisations and community of interests.<sup>525</sup> The composition of the panel is underscored by a commitment by Southwark council to involve diverse and marginalised communities in the

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<sup>523</sup> I. Young, *Inclusion and Democracy* supra no.166 pp121-153

<sup>524</sup> Ibid.,

<sup>525</sup> The Communities of Interests in this context include The Southwark Pensioners Forum, The Southwark Disability Forum, the Southwark Gay and Lesbian Forum, The Southwark Disabled Staff Forum and the Southwark Humanist Organisation. There is also The Southwark Disablement Organisation and The Organisation of Blind African Caribbeans.

decision making process of the council by ensuring that different communities are able to bring to the council's agenda their respective views and experiences, which they can best do only if they speak in their own voices.

According to Young's analysis of representation, there are three elements which ought to define the representation of persons with disabilities in the EDP; first, the representative must be capable of looking after the interests of persons with disabilities. Secondly, it is important that the representative be able to voice and articulate in discussions of the panel the principles, values, and priorities that persons with disabilities think should guide the decisions of the council. Finally, the representative must at least understand and be able to express the social experience of persons with disabilities arising from their social group position and how this relates to the history of social group relations. This study discovered that in some instances, These representatives are selected by the staff of the social policy unit of the council and maintained in the panel even where they are evidently not capable of responding to excessive demands engendered by the participatory process.

### **2.2.2 Participatory Deliberation as Substantive Equality**

An obvious consequence of the involvement of external stakeholders in the conduct of equality impact assessments by Southwark council is the fact that it transforms the process from a bureaucratic exercise to one of deliberative democracy. A unique characteristic of the Southwark Equality and Diversity Panel with regards to disability is the fact that its diverse membership ensures that different experiences are brought to impact on disability issues. It may be the case that by including such a diverse range of groups in the panel, Southwark council does not only recognise that no single language can adequately capture or express all the diverse experiences of and insights into the structures of discrimination and inequality but also that what it means to treat citizens as equals is not self-evident in a culturally plural society, but has to be worked out through democratic dialogue in which the full range of different points of view are represented. The membership of the panel was extended in September 2009 to include a representative of the Southwark Disability Staff Forum (DSF) and it may be the case that this will broaden the range of experiences and perspectives on disability which could enrich the discussions of the panel.

The Panel provides a forum where persons with disabilities or their representatives contribute to the review and assessment of the council's functions and policies on a continuing basis. This provides persons with disabilities and their representatives with the opportunity to develop and build an enduring relationship with the local authority which is vital for the promotion of equality and the elimination of discrimination in service delivery.

### **2.2.3 Participatory Parity**

An important principle which appears to underpin the working of the EDP is that of participatory parity which dictates that all the members of the panel are equal and that their view are given equal importance by the council. With regard to persons with disabilities, the principle operates to ensure that their representatives are given the opportunity to participate equally in the discussions of the panel and that their voices are heard and their interests, opinions and perspectives carry equal weight as all the other members of the panel. The principle is important when it is considered that persons with disabilities have traditionally been excluded from public discussions and that they have been considered as objects of charity and not citizens capable of making positive contributions to policy design and implementation. In this way, the principle operates to enhance the ideals of equality and non-discrimination in the disability context.

### **2.2.4 Scrutiny and the Role of Critical Friend Challenge**

An important aspect of the role of the EDP which is capable of anchoring it to the notion of substantive equality is that of scrutinising the policies and practices of the council by playing the role of critical friend challenge to the equality impact assessments carried out by the staff of the council.<sup>526</sup> The significance of this role may be understood if it is recognised that the staff of Southwark council are a part of a dominant institutional culture which can create difficulties for them when assessing the impact of the organisation's policies and practices, or even prevent them from identifying discriminatory practices. In this case, the involvement of persons with disabilities may be critical in helping the council in combating discrimination

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<sup>526</sup> G.Fawcett et' al, 'Open to public scrutiny Involving the public in overview and scrutiny: A guide for councillors and support officers on overview and scrutiny committees' (OPM 2007) available at [http://www.opm.co.uk/site\\_search?site\\_search\\_keywords=scrutiny](http://www.opm.co.uk/site_search?site_search_keywords=scrutiny).

against and promoting equality for this group of persons.. They should be better placed to reveal barriers caused by long-accepted ways of doing things and to suggest alternatives.

It was clear during this research that members of the EDP panel did not only challenge and criticise the equality analysis of the staff of the council but also were a source of new and innovative ideas which were incorporated in to the impact assessment reports by the relevant staff. However, this study was able to identify certain factors that could operate to limit the ability of the panellist to scrutinise effectively the equality impact assessments conducted by the staff of the council. First, even though Panellists are provided with copies of impact assessment reports before the panel meetings, a common complain amongst the Panellists was that the departmental equality impact assessment reports were often too lengthy and some were written in very technical language which some of the Panellists could not understand. The council may be violating its own internal guidelines on the writing and publication of EQIAs reports and this may not be helpful to the effort to promote an effective participatory deliberation.<sup>527</sup> The council's guidance on publication provides that , as a general rule, stage one reports should not be longer than six pages and stage two reports should not be longer than eight pages. The publication guidance further provides that the reports should be written in plain English, avoiding when necessary the use of technical jargon. The members of the panel are not technical experts nor do they represent an epistemic community and if they are unable to understand the impact assessment reports of the staff of the council, then it is likely that they will not be able to make any meaningful contribution to the decision making of the council.

Second, the time allocated for the Panel meetings may be limited and not sufficient. The Panel meets for an average of 2 hours monthly which appears to be insufficient time for Panellists to scrutinise the reports of the council's staff and make their contributions to the impact assessment process. At least two EQIAs reports are presented at each meeting of the panel and the tendency is for the departmental staff to present their reports as quickly as possible with minimum disruption from the Panellists by way of questions and comments.

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<sup>527</sup> See generally Equalities Scheme 2005-08, Annex 4 supra no.485



Third, even where the Panellists are able to assess and make recommendations on the departmental impact assessment there is no means by which the Panellists would know if their comments or recommendations have been taken on board by the council's departmental staff because there is no provision for a feed-back to the Panel on departmental actions following the stage 2 impact assessment by the panel. This is a particular weakness of the Panel which undermines its ability to scrutinise effectively the impact assessment carried out by the council staff. Within the context of the duty on public authorities to promote equality, the requirement that public bodies scrutinise their policies and functions imply that there should be a strong emphasis on effectiveness, entailing both a careful and detailed consideration of the impact of the council's policies and strategies and stringent monitoring of their effect in practice.

The Panel is supposed to meet on a monthly basis but this is not often the case as logistical and other organisational constraints operate to prevent it from meeting. This is further aggravated by the fact that there is no fix meeting place for the Panel which has to depend on the availability of meeting rooms in any of the council's numerous buildings for it to hold its meetings. Though the Panel has gained a consultative status within the council, there is still no independent funding for its activities. This has meant that, in most instances the council is unable to pay for the transport fares of Panellists who have to depend on their personal resources to attend panel meetings. These may act as a disincentive to attending meetings by Panellists especially those with disabilities who may not be in employment and are dependent on welfare benefits. The DRC has advised on the costs implications of involving persons with disabilities [and other groups in the community] in the decision making machinery of the public body on a continuing basis, pointing out that public bodies with large resources could afford a robust engagement. The crucial question therefore is whether local authorities are willing to take the leap of faith necessary to give sufficient financial and logistical resources for the promotion of participation.

### 3. Promoting Equality through Partnership

Partnership and collaboration between public bodies and voluntary and community organisations in the delivery of services and the elimination of inequality, referred to by *Spencer*<sup>528</sup> as *rapprochement* is an important mechanism for fighting discrimination in the delivery of services and the promotion of equality for persons with disabilities in the community. The thrust of the statutory duty on equality is the fact that it shifts the focus of the law from the command and control approach encapsulated in the conventional anti-discrimination statute to an approach that encourages not only the development of partnerships between public agencies but also the involvement of different stakeholders such as voluntary organisations and community groups in identifying the causes of inequality and in finding pluralistic solutions in ways that stimulate consensus, and thus increases social cohesion.<sup>529</sup>

Within the context of the statutory duty on equality, partnership constitutes a framework for participation which could be crucial in the attainment of substantive equality for persons with disabilities. First, Inequality can be a product of many factors not all within the control of a single public body. Working in partnership to tackle the various causes of inequality represents an important first step in achieving substantive equality.<sup>530</sup> Second, the statutory duty challenges the conceptual divide between discrimination and other causes of inequality which has underpinned the conventional anti- discrimination law in the past.<sup>531</sup> The demonstrated link between socio-economic disparities, impairment and discrimination

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<sup>528</sup> S. Spencer, 'Poverty and Equalities: Closing the Agenda Gap' Speech delivered at the IPPR Conference 'Equalities: Tackling Inequality, Achieving Equalities', 21 November 2007 available at <http://www.edf.org.uk/blog/?p=333>.

<sup>529</sup> C. McCrudden, 'Equality Legislation and Reflexive Regulation' *supra* no.489 pp 255-266.

<sup>530</sup> S. Fredman and S. Spencer, 'Equality: Towards and Outcome Focused Positive Duty' *supra* no.102 pp. 14 – 19. For a description of partnership working in the promotion of equality in Northern Ireland, see generally M. Beirne, 'Social and Economic Rights as Agents for Change' in C Harvey(ed) *Human Rights in the Community: Rights as Agents of Change* (Oregon, Hart Publishing 2005) pp43-62.

<sup>531</sup> S. Fredman, 'Equality: A New Generation?' *Supra* no. 9 pp.145-168. Also T. B. Donaghy, 'Mainstreaming: Northern Ireland's participative Democratic Approach' *Policy and Politics* Vol.31, Vol32 pp 49-62 Available at <http://www.qub.ac.uk/cawp/research/mainstreaming.PDF>

underlines the need for a more holistic response to eliminate inequality across place and position if substantive equality is to be achieved for persons with disabilities.<sup>532</sup>

### **3.1 The Southwark Council's Partnership Framework**

The local government architecture in the UK is being reconfigured by partnerships between statutory bodies and voluntary and community organisations which may provide a new framework for the participation of persons with disabilities and their representative organisations in the delivery of public services by public bodies.<sup>533</sup> It may therefore be the case that a local authority that positively supports partnerships involving representatives of persons with disabilities may in fact be upholding the rights of this group of citizens.

This study explore the implications on the participatory rights of persons with disabilities in particular and the promotion of equality for this group of persons in general of the London Borough of Southwark theorising about and implementing strategic partnerships by identifying the legal issues and tensions arising from such a regulatory framework within the context of the duty on public authorities to promote disability equality. However, Successful partnership working depends as much on people as it does systems and structures. Partnership, participation, and information are different levels of involvement across a spectrum and it may be the case that the DED provides the crucial hinge that links the three in such a manner that enhances trust, accountability and transparency between the local authority and persons with disabilities.

#### **3.1.1 Corporate Partnership and Equality**

Southwark council appears to be championing a collaborative approach with key local partners within and outside the borough in the delivery of local services which may impact positively on the promotion of equality for persons with disabilities. Partnership working in

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<sup>532</sup> C. Baylies, 'Disability and the Notion of Human Development: questions of rights and capabilities' *Disability & Society*, Vol. 17, No. 7, 2002, pp. 725-739.

<sup>533</sup> J. McGregor, 'Local Government/Third Sector Partnership: Making Change Happen' An NLGLN available at <http://www.nlgn.org.uk/public/2007/local-governmentthird-sector-partnership-making-change-happen>.

Southwark involves a complex interplay of Statutory, voluntary and community organisations working together in a number of ways ranging from informal networks to formal contractual arrangements.<sup>534</sup> Three features of the Southwark strategic partnership framework could be identified which could impact directly on substantive equality for persons with a disability in the delivery of services. First, the council's main strategic partnership, the Southwark Alliance (SA) has been developed around a number of thematic partnerships which act as major catalysts for change by developing and managing the delivery of a specific number of strategic, cross-cutting programmes in support of the objectives of the borough's Sustainable Community Strategy, the Southwark 2016.<sup>535</sup> The Southwark Partnership Chart shows all the thematic partnerships in the London Borough of Southwark and how they relate to the Southwark Alliance (see Appendix A).

Second, the partnership arrangements provide a framework not only for understanding how citizens interact with public services in the borough but also of how the council could explore opportunities for service redesign through an inclusive approach to policy and strategy development. Third, the Southwark partnership framework is underpinned by a commitment to promote accessible communications by developing a positive engagement with the voluntary sector through the representational structures supported by Community Action Southwark (CAS).<sup>536</sup> The Community Action Southwark is an umbrella organisation representing all the community and voluntary groups in the London Borough of Southwark, including those representing persons with disabilities.<sup>537</sup>

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<sup>534</sup> The Southwark Partnership framework involves both the statutory and non statutory bodies and is co-ordinated by the Southwark Alliance. For details on the partnership framework in Southwark, see generally 'The Southwark Alliance, who we are and what we do' available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>535</sup> The Southwark 2016 is the Council's local Sustainable Community Development document which embodies the socio-economic vision of the borough. All the partners are committed to work together towards the realisation of the goals of the Southwark 2016. For details on Southwark 2016, see [http://www.southwark.gov.uk/download/753\\_2016\\_sustainable\\_community\\_development](http://www.southwark.gov.uk/download/753_2016_sustainable_community_development).

<sup>536</sup> Southwark Alliance, Proposals in response to the recommendations of the Review of Strategic Partnerships. See also minutes of the board meeting of Southwark Alliance of Wednesday November 2009 available at [www.southwark.gov.uk/download/5469/lsp\\_minutes\\_11\\_november\\_2009](http://www.southwark.gov.uk/download/5469/lsp_minutes_11_november_2009)

<sup>537</sup> For details about CAS, see <http://casouthwark.org.uk/>.

### 3.1.2 Strategic Partnership as an Interface between Systems and the Live World

In order to understand how strategic partnerships could operate as an interface between systems and the live world in order to eliminate discrimination and promote equality, it was important to distinguish between the state or the public sector, economy or the private sector and the live world or the civil society or voluntary sector as representing three distinct ways of co-ordinating action in the community.<sup>538</sup> In this respect, reliance was on Haberman's distinction between systems and the life world. State and economy are each systemic not only because of their ability to condition the actions of large number of people by respective system imperatives of bureaucratic routine or profit-making but also because those through which the systems operate need not directly communicate with one another.<sup>539</sup> The 'life world' or voluntary and community sector refer to those activities and institutions which are structured primarily through communicative interaction rather than by systemic imperatives in relation to which actors reason instrumentally and strategically. In fact, to the extent that its membership is free and voluntary and its activities conducted through communicative interaction, the Southwark Alliance could be considered as an uncoerced relational network of the lived world which must be distinguished from systems of state and economy.<sup>540</sup>

### 3.2 The Southwark Alliance and the Operationalisation of Strategic Partnership

Central to the Southwark strategic partnership framework is the Southwark Alliance. The Southwark Alliance is the council's main local strategic partnership which was formed in 2001 with the aim of bringing together the different statutory and non-statutory agencies within and outside the borough capable of influencing decisions taken by organisations that impact on the social and economic life of the borough. The current partners of the alliance are shown on the Alliance's Partnership Chart in Appendix A. . There are four levels of analysis of the SA as a strategic partnership between the public, private and voluntary sectors in the London Borough of Southwark which could impact on the understanding of the participatory rights of persons with disabilities within the context of a substantive equality paradigm; the concept of Public

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<sup>538</sup> I.M. Young supra no. 166 p. 158.

<sup>539</sup> J.Habermas, *The Theory of Communicative Action*, ii (Boston, Beacon Press 1984).

<sup>540</sup> Ibid.

Sphere and equal accessibility, deliberative democracy, accountability and transparency and participatory parity.

### **3.2.1 The SA as a Public Sphere and the principle of Equal Accessibility**

According to Young,<sup>541</sup> the public sphere is an uncoerced network for communicating information and points of view. It is a process through which problems of the whole society are discussed, views and opinions processed into bundles of topically specified public opinions and finally brought to influence the formation of authoritative law and public policy. Conceptualised as public sphere, the Southwark alliance is an intermediary structure between the network of partners from the Public, private and the voluntary and community sectors. As a thematised strategic partnership, the SA represents a highly complex network of continuous discourse and expression that branches out into a multitude of overlapping local themes and sub cultural areas embodied in the thematised partnerships.

As an uncoerced network, membership of the alliance is free and opened to anyone who could contribute to the development of the borough.<sup>542</sup> In other words, there are no barriers, normative or otherwise which could operate to restrict access, implying that persons with disabilities and their representative organisations could in principle be members and thus be able to bring along their perspectives to bear on the policies of the council. In this respect, accessibility refers neither to a function nor to the content of opinion or expression, but to the social space generated in communicative action within the partnership. Thus, to the extent that the alliance operates within an inclusive rather than an exclusionary framework with regard to persons with disabilities it could be said to be promoting equality for this group of citizens.

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<sup>541</sup> I.M. Young supra no. 166.pp.167-180.

<sup>542</sup> See generally 'About Southwark Alliance' available at [http://www.southwark.gov.uk/site/scripts/google\\_results.php?q=About+Southwark+Alliance](http://www.southwark.gov.uk/site/scripts/google_results.php?q=About+Southwark+Alliance)

### 3.2.2 Norm Setting and the Southwark 2016

A defining feature of the Southwark partnership framework encapsulated in the SA is the fact that it sets out the strategic vision of the borough in terms of its socio-economic development and it is this vision that guides the corporate priorities of the public bodies, the private sector and the voluntary and community organisations with regard to the delivery of services to the public. The strategic vision of the Alliance as it relates to the socio-economic growth and development of the borough of Southwark is contained in the Sustainable Community Strategy, referred to as the Southwark 2016.<sup>543</sup> An aspect of the Southwark 2016 document which plugs it to the substantive equality paradigm is the fact that the document is an embodiment of the collaborative working spirit of the public, private and voluntary and community sectors, thereby reflecting the diverse views and perspectives of the residents of the borough. Two consequences flow from the 2016 document in terms of its normative legitimacy; first, using Habermas's theory of communicative reasoning, the document could be seen as encompassing a process in which the social perspectives of the life worlds of the community and voluntary sectors are rationalised under the pressure of systemic imperatives.<sup>544</sup> In this respect, it could be concluded that the fact that the 2016 document itself is the result of a collaborative working between the partners of the Alliance may imply that its formulation reflects the forms of communicative reasoning that confer legitimacy on political will-formation. It provides a platform from which to understand the network of discourses within the alliance that aims not only at forming opinions but also at reaching pluralistic decisions on a consensual basis. It is this network of collaborative discussions and discourses that provide the framework for combating discrimination and for promoting equality for the various groups in the community.<sup>545</sup>

Second, the SA, as embodied in the 2016 document demonstrates the socially integrating force of rationally motivating, non coercive processes of reaching understanding between partners. Such a process provides a space for distance and recognised differences within a sustained

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<sup>543</sup>Southwark 2016 supra no.528.

<sup>544</sup>J. Habermas supra no.539.

<sup>545</sup>C. Scott, 'Regulation in the age of governance: The rise of the post-regulatory state' in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation* (Cheltenham: Edward Edgar, 2004) Pp.145-174.

commonality of convictions.<sup>546</sup> Thus, to the extent that the SA is able to avoid marginalised groups in the borough such as persons with disabilities from becoming slaves of consensus thinking by capturing and integrating their views and perspectives in a manner that would inform the perspectives of the other partners, it may be said to represent substantive equality for these groups of persons in the community.

The Southwark Sustainable Community Strategy outlines three objectives which are expected to guide the priorities of the partners;

- Improving life chances
- A better place for people
- Delivering quality services.

These objectives are to be accomplished within the framework of the core principles of equality and human rights enshrined in the council's Equality and Human Rights Scheme 2008-2011<sup>547</sup> and translated in to the Southwark Compact, which is the council's partnership agreement with the community and voluntary sector.<sup>548</sup> The risk here is that, by encouraging deliberation on how to implement these values, collaborative working through partnership may lead to the undermining of the values themselves. Furthermore, there is a real danger that the different partners within the alliance may increasingly come to view themselves as autonomous subjects of law, thereby robbing partnership communication of its socially integrative meaning. In other words, by viewing the Alliance as simply one social subsystem with its own values, the partners of the Southwark Alliance may underestimate the extent to which the alliance plays an important expressive role in articulating shared values that the community regards as fundamental, not debatable.<sup>549</sup> This is particularly important when it is noted that the alliance does not have a separate legal personality and that it is the values, encapsulated in this instance in the Southwark 2016 that functions as a hinge between the partners of the alliance.

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<sup>546</sup> IM Young supra no. 166. P.167.

<sup>547</sup> The Southwark Equality and Human Rights Scheme 2008-11 available at [www.Southwark.gov.uk/info/200041/equality](http://www.Southwark.gov.uk/info/200041/equality) and diversity (accessed April 2009).

<sup>548</sup> Southwark Compact: An agreement between Statutory Agencies and Voluntary, Community and Faith Organisations in Southwark available at [www.southwark.gov.uk/download/4803/southwark\\_compact](http://www.southwark.gov.uk/download/4803/southwark_compact).

<sup>549</sup> C. Scott, 'Regulation in the age of governance...' supra no.545. pp.145-174.



### 3.2.3 A Loci for Participatory Democracy

An important aspect of the SA which has the potential to deliver substantive equality for persons with disabilities is the fact that it provides a forum where the residents of the borough, including persons with disabilities could freely express their views and opinions on issues affecting their socio-economic wellbeing and that these views are capable of being channelled to form part of the corporate plan, community strategy and Local Area Agreement of Southwark council. Theorising the SA as a network for opinions and loci for deliberative democracy amongst the residents within or outside Southwark brings to light two changes in typical understandings of participation and deliberative democracy within the context of our public bodies. First, participation need not be a face-to-face interactive process that ‘engages a unified people making decisions for society as a whole.’<sup>550</sup> Instead, processes of participatory deliberation should not only be understood as subject less and decentred but also as mediated among people dispersed in space and time.

Second, within the context of partnership working, there must be a shared understanding in print amongst the partners of the aims of the deliberative process. According to Habermas, the public sphere could be defined in two dimensions: empirical and normative. Empirically, the public sphere is a distinct, institutionalised form of verbal and written interaction, distinct by virtue of its taking place in public fora and in print. Normatively, the public sphere is a forum through which ordinary citizens could compel public authorities to legitimate themselves before public opinion, a public opinion whose authority depend On its mode of open argument.<sup>551</sup> With regard to the empirical dimension of the SA as a public sphere, this study was able to establish that the Southwark Compact is a written document that embodies the commitment of the statutory agencies and the voluntary, community and faith sector in Southwark to work in partnership to improve the social, economic and environmental well-being of the borough. What is crucial here is the fact that the compact not only recognises the important contributions the participation of marginalised groups such as persons with disabilities could make to the improvement of local service delivery but also commits the local authority to engage these

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<sup>550</sup> J. Habermas, *Between Facts and Norms*, supra no. 490 pp. 304-7.

<sup>551</sup> Ibid.

groups of persons through the voluntary and community organisations in its decision making machinery.<sup>552</sup>

### 3.2.4 Accountability and Transparency

Within the context of the Southwark partnership compact, linking accountability and transparency as systems of control to the heterogeneous participation of persons with disabilities gives rise to 3 elements in terms of the rights based perspective to disability; first, the partnership is founded on standards based on such fundamental principles as equality of opportunity, integrity, objectivity, accountability, openness, honesty and leadership. Second, the partnership enshrines the principle of equality between the partners in a partnership relationship wherein the partners are committed to listen to one another. This commitment is important as it requires the statutory sector, including Southwark council to abandon the traditional up-down, paternalistic approach in its dealings with the voluntary and community organisations, especially those representing persons with disabilities who have traditionally been subjected to such paternalistic control by the public service in the delivery of welfare services. Behaviour modification would also require that the public sector takes a proactive approach to involving marginalised groups such as persons with disabilities in consultations in a meaningful and constructive manner that will not only value their contributions but will also uphold their dignity. The third element relates to the gathering and accessibility of information about the activities of the partners, especially the public bodies whose workings have been shrouded in a cloak of secrecy.

A fundamental principle of the partnership is transparency that is the requirement that information be provided between the partners in an open and honest manner.<sup>553</sup> Empowerment results from information, knowledge and awareness. Persons with disabilities and their representative organisations would hardly be said to hold the council to account if they are not provided with information about the activities of the statutory body or if

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<sup>552</sup> See generally Southwark Compact supra no.541.

<sup>553</sup> Transparency is a key element in the implementation of the Public Sector Equality Duty under section 149(1) Equality Act 2010. See The Equality Act 2010: The public sector Equality Duty Promoting equality through transparency a consultation available at [http://www.equalities.gov.uk/pdf/402461\\_GEO\\_EqualityAct2010ThePublicSectorEqualityDuty\\_acc.pdf](http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf). Also, The Equality Act 2010 (Specific Duties) Regulations 2011 SI No. 2260 Equality Act 2010.

information is presented in a dishonest manner. As a multi agency, the Alliance constitutes a structure for the development of a join-up approach to combating inequality and social injustice. The membership of Southwark Alliance is made up not only of organisations responsible for providing public services but also of representatives of the private and voluntary and community sectors within the borough, demonstrating an essential collaboration between the state, economy, and civil society. However, it is probable that the differences in organisational and sectoral cultures, especially with regard to issues such as accountability, perceptions of power and expectations of the partners may create unexpected challenges on the partnership.<sup>554</sup>

### **3.3 The Principle of Participatory Parity and the Notion of Collaborative Partnership**

An important dimension of the operationalisation of the Southwark Alliance is the principle of participatory parity which dictates that all the partners be given the opportunity to participate and contribute to the discussions of the partnership on equal terms. The principle of participatory parity is important when it is recognised that Even though formal access may be the same for all the partners of the alliance, the greater resources of wealth, power, influence and access to information may lead to the partnership being dominated by the partners from the public and private sectors to the detriment and marginalisation of the voluntary and community sector. A linked effect of this is the fact that the interests, opinions, and perspectives of the dominant actors may tend to monopolise policy discourse in the partnership.<sup>555</sup>

#### **3.3.1 Interdependency between Partners.**

The concept of interdependency is what underpins the dynamism of a partnership developed within a regulatory framework that encourages dialogue between public bodies and its stakeholders. In the context of the SA, interdependence means that both the statutory bodies and the voluntary and community organisations must depend on each other with regards to the formulation and implementation of policies and that no single sector 'gets its way' repeatedly without enlisting the explicit or tacit support of the

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<sup>554</sup> J. McGregor, 'Local Government supra no. 533.

<sup>555</sup> I.M Young supra no. 166 Pp.52-80.

other sector. Two consequences could be derived from this position with regard to the participation of persons with disabilities in the decision making machinery of the SA as a strategic partnership; first, the parties must work towards an equal partnership relations that recognise and understand the contribution, roles and constraints of the statutory sector on the one hand and the voluntary, community and faith sectors on the other hand. In other words, participatory parity is built on an understanding that Different partners may have different contributions to make but their participation in the partnership carry equal weight within the joint decision-making framework of the alliance. This understanding has been underscored by the national Compact Working Group which defines partnership in terms of the opportunities which each partner has to contribute and influence the policies of the partnership. However, unless the partners of the alliance are able to communicate with and influence one another, organisations representing persons with disabilities will simply be parochial separatist enclaves with little role to play in a process of solving problems that cross groups, or problems that concern relations among the groups in the community. In other words, the right to participate is nothing if not assured to all on equal terms and with parity of esteem.

Second, the partnership must operate within the boundaries of an inclusive framework which creates the opportunities for involving and integrating the perspectives of under-represented and marginalised groups in partnerships, consultation and decision making processes. By adopting an inclusive approach to decision making , the Southwark Alliance is not only fulfilling a requirement of the general duty to promote the participation of persons with disabilities in public life but is also delivering substantive equality to this group of persons.

### **3.3.2 Enduring Relationship of Trust.**

The DED is a legislation that is intended to build an enduring relationship between public bodies and persons with disabilities based on trust and mutual respect as a mechanism for promoting the participatory rights of this group of persons in the delivery of services. The Southwark Alliance partnership is built on the principles of trust which is related to the issue of accountability and transparency. The alliance does not have a separate legal personality. A

linked effect of this is the fact that communication is not only essential for participation but also provide a mechanism by which both the local authority and community organisations such as those representing persons with disabilities could develop relationships based on mutual trust and for understanding the organisational culture and work style of each other. See 2.57 and 58 for accountability and transparency. An important feature of the regulatory framework encapsulated in the public sector equality duty is the concern with information which points to a wider discussion of accountability and transparency. Theorised within the principal-agent analysis, the Southwark Alliance may present formidable challenges with regard to the issue of accountability and transparency, especially where their absence facilitates the possibilities for bureaucratic 'drift' in terms of the staff of the council developing and implementing policies in a discriminatory and biased way which may be adverse to the rights of persons with disabilities. Bureaucratic drift could occur as a consequence of limited control due to the absence of adequate or incomplete information. This research was able to identify as a potential source of tension the fact that the statutory sector and the voluntary and community sector have different forms of accountability and are answerable to a different range of stakeholders. However, common to the both sectors is the need for integrity, objectivity, accountability, openness, honesty and leadership.

### **3.3.3 Strategic Thinking**

The purpose of involving persons with disabilities in the decision making network is to ensure that their needs, concerns and experiences are taken into account by the public bodies when deciding on their strategic priorities. The identification of the needs and concerns of persons with disabilities does not only guarantee substantive equality but is also a social right. Social rights require governments to provide their citizens with the most basic amenities of life, such as food, water and housing. Social rights like substantive equality are objectives which governments are expected actively to work towards their attainment.

## **Chapter Six: The London Borough of Southwark and the Employment of Persons with Disabilities.**

### **Introduction.**

The employment of persons with disabilities is an important dimension not only in achieving their equal participation in society but also in preventing their social exclusion. There is a correlation between employment, discrimination and the promotion of the rights of persons with disabilities.<sup>556</sup> Though the nature and severity of disability vary greatly, the one common denominator in the lived experiences of persons with disabilities is their low level of participation in the employment market and their relative inability, due partly to discrimination to stay for long in paid employment. Research has established that, despite the welfare effect of employment, only 50 % of the 1.3 million persons with disabilities of working age are in any form of paid employment in the UK, compared with 80% of non disabled people.<sup>557</sup> At the level of the London Borough of Southwark, 17 percent of its residents have a disability while only 4.4 percent of the staff of the council are disabled.<sup>558</sup>

This chapter is focused on establishing the impact of the Public Sector Equality Duty on the employment policies and practices of Southwark council and their implications on the rights of persons with disabilities both to take up and retain employment with the council. Section one considers some of the policies and strategies that have been developed by the council to facilitate the entry in to the labor market of persons with disabilities. Section two takes an analytical snapshot of the impact of the council's policies and practices on job advertisements and recruitment of its staff while section three is framed around the council's policies and practices to improve workplace harmony through the promotion, retention and dismissal of its

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<sup>556</sup>Part 5 of the Equality Act 2010 deals with discrimination in employment. For a comprehensive discussion on the relationship between disability and discrimination under the Framework Directive, see G. Quinn, 'Disability Discrimination Law in the European Union' in H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, Cambridge University Press 2010) pp231-277. Also, G. Quinn, 'The Human Rights of People with Disabilities Under the EU Law' in P. Alston, M. Bustelo and others (eds), *The EU and Human Rights* (OUP, 1999) p. 281.

<sup>557</sup> The ICT Strategy, Disabled People and Employment in the UK, research conducted by The Institute for Employment Studies (IES), University of Sussex, March 2007 ISBN: 9 781 85184 383 1. Also see Disability Rights Commission (DRC), *The Disability Agenda: Creating an alternative future*. Disability Rights Commission, February 2007 available at [www.disabilityagenda.org](http://www.disabilityagenda.org). (accessed June 2007). The DRC has now been merged into the new Commission for Equality and Human Rights (CEHR).

<sup>558</sup> London Borough of Southwark Annual Resident Survey 2010.

employees with disabilities. The data that emerged from this study suggest to us that the London Borough of Southwark may be regarded as moving in the same direction as the law, from the prevention of discrimination to the promotion of equality.<sup>559</sup>

## **1.0 The Pathway to Employment.**

The pre-employment policies and practices of Southwark council were considered from two broad perspectives; first, the council's borough-wide employment strategy was considered in order to establish the legal and policy framework within which the organizational policies and practices could be analyzed. Second, the study considered the council's positive action Preparatory process for employment which included vocational training and work experience within the context of the Southwark Works program. This approach was necessary because it afforded context and structure to whatever positive measures that the council may be adopting in order to encourage the labor market participation of persons with disabilities. It also provided a link between policy and practice which is important in the attainment of substantive equality for this group of citizens.

### **1.1 The Southwark Employment Strategy 2005 – 2016**

The Southwark Employment Strategy 2005 – 2016<sup>560</sup> is a borough-wide strategy which provides a framework for the management of barriers to employment by the council. *The strategy contains a number of indicators that target members of disadvantaged groups, including persons with disabilities.* The overall vision of the Strategy is “to maximize opportunities for accessing and sustaining high quality employment for all Southwark’s residents “and contains certain underlining principles which may impact on the council’s ability to deliver substantive equality to persons with disabilities in the borough seeking to enter in to and stay in employment.

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<sup>559</sup> Even though this research was conducted at the organizational (rather than the borough-wide) level to increase the ability of the study to examine practice, rather than policy alone, references to borough wide policies may occasionally assist to establish a co-relation between the organization’s policies and practices and the wider environment in which they are implemented

<sup>560</sup> The Strategy was developed within the framework of the Southwark Alliance (SA) which is the Council’s Local Strategic Partnership (SLP) and is available at [http://www.southwark.gov.uk/info/200272/evidence\\_base/1612/economic/1](http://www.southwark.gov.uk/info/200272/evidence_base/1612/economic/1). Also, see Southwark Council Enterprise Strategy 2005-16 at [http://www.southwark.gov.uk/downloads/downloads/1730/enterprise\\_strategy](http://www.southwark.gov.uk/downloads/downloads/1730/enterprise_strategy).

### 1.1.1 Equality of Access

*An underlining objective of the Southwark Employment Strategy is the provision of equal access to employment to members of marginalized and disadvantaged groups in the community, including persons with disabilities.<sup>561</sup> This has a particular resonance with the purpose of the Framework Directive which is to lay down a general framework for combating discrimination' on various grounds including disability in the employment context 'with a view to putting into effect in the Member States the principle of equal treatment'.<sup>562</sup>*

With regard to the entry of persons with disabilities in to the field of employment, the principle of equality of access does not only require that Southwark council ensures that all preparatory processes for the participation of this group of persons in the field of employment are made available to them on equal terms with all other members of the community but also that access barriers to their employment are progressively removed. An important barrier to the ability of persons with a disability to enter in to employment is the prevalence of discrimination based on disability.<sup>563</sup> This appears to represent an outcome focused approach to the promotion of the employment rights of persons with disabilities which is not only underpinned by a notion of substantive equality but is also capable of challenging the notion of inability and welfare dependency that is associated to disability.

There were two aspects of the Southwark Employment Strategy which this study identified as being capable of undermining the attainment of substantive equality for persons with a disability inherent in the principle of equality of access. First, the operationalisation of the principle of equal accessibility within the context of disability carries with it the recognition of the heterogeneity of persons with a disability and the need for Disability disaggregation as a mechanism for negotiating access barriers to employment. Disability

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<sup>561</sup> Accessibility to employment was identified as a key action point in both the Council's Disability Equality Scheme (DES) 2005-2008 and the Equality and Human Rights Scheme 2008-2011. Both schemes are available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>562</sup> Council Directive 2000/78/EC of 27 November 2000 (The Framework Directive), Article 1.

<sup>563</sup> G. Quinn, 'Disability Discrimination Law in the European Union..' supra no.38.



disaggregation resonates well with a substantive approach to disability discrimination<sup>564</sup> especially when one considers the fact that research has demonstrated that the employment chances of persons with disabilities vary with such factors as the type of disability and the degree of impairment of the disability. Research has established that the employment chances of persons with visual impairment are closely connected with the severity of their seeing difficulties. People with seeing difficulties who have other forms of disabilities have a lower employment rate (48 per cent) than other disabled people (50 per cent) while people with seeing difficulties who do not have other forms of disabilities have a much higher employment rate (83 per cent), which compares with the overall working age employment rate of 75 per cent.<sup>565</sup> Persons with a disability are not a homogenous group and the failure of the Southwark Employment Strategy explicitly to address the issue of the heterogeneity of persons with disabilities would suggest that the strategy is still rooted in the one-size-fits-all model of equality which is incapable of delivering substantive equality for persons with a disability.

Second, none of the three key strands of the Strategy (Maximise Effective Use of Resources; Build an Employability and Learning Culture in Southwark and Partnership) place any significant or explicit emphasis on the training and development of Information and Communication Technology (ICT) as a key mechanism for enhancing the inclusion of persons with disabilities in the labor market.<sup>566</sup> This is particularly significant when one considers the fact that research has established that the promotion of the use of assistive technology such as the Jaws for the visually impaired and laptop and 'text to speech' (TTS for the hard to hear is a vital mechanism for getting persons with disabilities in to the labor market. This point is buttressed by the fact that the European Commission had identified in its new Social Agenda of 2005-2010 the promotion of rapid technological change as one of

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<sup>564</sup> C. O'Cinneide, 'A New Generation of Equality Legislation? Supra no.2 pp 219-248.

<sup>565</sup> Labour market experiences of people with seeing difficulties Secondary analysis of Labour Force Survey data September 2008. Prepared by: Institute for Employment Studies University of Sussex available at [www.employment-studies.co.uk](http://www.employment-studies.co.uk)(accessed March 2010).

<sup>566</sup> The strategy identifies particular barriers but does not explicitly link them up to the different groups of persons with disabilities.

the three main drivers of change in contemporary Europe.<sup>567</sup> This is an important development which would impact positively on the programs and policies designed to promote the entry of persons with disabilities in to the labour force. Rapid technological change provides new opportunities to enable the true talents of persons with disabilities to be put to productive work, thereby underscoring the need to intensify the equal opportunities agenda in the disability context.

The lack of emphasis on the development of ICT by Southwark council could lead to unequal distributive outcomes, causing for example disproportionate levels of unemployment among some groups of persons with disabilities. If the removal of access barriers to employment is a key mechanism for the promotion of equality for persons with disabilities by Southwark council, then it is plausible to conclude that the failure of its strategy to deal with the issue of ICT may be creating rather than removing barriers to some groups of persons with disabilities.

### **1.1.2. Sustainability**

The thrust of the Southwark Employment Strategy lies not only in its drive for equal accessibility to the labour market for all groups of persons but also in its recognition that persons with disabilities need support to remain in employment. In other words, sustainability of employment, like equal accessibility is key to the goal of equal opportunity for persons with disabilities in the employment context. Sustainability in this context could be analysed from two levels. At the organizational level, the concept carries with it an obligation on the council to proactively identify and take remedial steps to remove all barriers that may prevent persons with disabilities from staying in its employment. A key factor in this respect is the council's ability to make reasonable adjustment. According to Article 5 of the Framework Directive, the duty to make reasonable adjustment means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Also, the council must ensure that policies adopted to promote equality in the workplace are sustainable and not

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<sup>567</sup> The European Social and Economic Committee, 2005-10, COM (2005) 33 final, on Social Agenda available at <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.14310>.

amenable to short-term political exigencies. An outcome focused approach to disability equality will not only aim at removing obstacles faced by persons with disabilities but also to empower this group of citizens to remain in employment.<sup>568</sup>

At the individual level, ensuring that persons with disabilities are able to enter in to and remain in employment is increasingly being understood by the council in terms of the personal efforts and ambitions of the individual employee with a disability to stay in paid employment.<sup>569</sup> This could be linked to the merit principle which forms the basis of the recruitment policy of Southwark council and brings to light the provisions of Recital 17 of the Framework Directive which asserts that the Directive only covers those who can perform the 'essential functions' of a job with or without 'reasonable accommodation'. Also relevant here is the fact that the quest for a particular 'reasonable accommodation' should be an interactive one between the employer and the individual with a disability if the adjustment is to enable the abilities of the individual concerned to be put to work.<sup>570</sup> The employer will need to we will offer targeted and specialist support through the Work Programme identify carefully the truly 'essential functions' of a given job and to distinguish them from marginal functions. This shift from defining sustainability in terms of organizational policies to defining it in terms of individual effort and ambitions has a particular resonance with the government's articulation of equality which is based on choice and responsibility. The implication here is that equality for persons with disabilities is something which must be earned and whether one does so will depend upon one's 'choices'.

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<sup>568</sup> See generally Specialist Disability Employment Programme: Government's Response to Liz Sayce's Independent Review of Specialist Disability Employment Programmes, 'Getting in, Staying in and Getting on,' July 2011 CM 8106 available at <http://www.dwp.gov.uk/docs/sayce-response.pdf>.

<sup>569</sup> Ibid, the review into employment services for persons with disabilities by RADAR Chief Executive Liz Sayce, recommends changes to Government policy to support persons with disabilities to work in any role in any sector, rather than in segregated employment. According to a manager in the corporate organization department of the Council, training opportunities for staff with a disability depend to a large extent on the interest and ambition of the individual staff with a disability. (Interview conducted on Wednesday 7 April 2010).

<sup>570</sup> Improving the life chances of disabled people Final Report January 2005 HMSO. The current government's Specialist Disability Employment Program focuses targeted support on individuals and not organizations.

The above notwithstanding, the strategy could have impacted more positively on the ability of persons with disabilities to enter in to and stay in employment and thus have more relevance to the council's compliance with the duty to promote disability equality had it addressed such issues as the elimination of harassment and negative attitude against employees with disabilities or the need to promote positive attitudes toward employees with disabilities amongst employers.<sup>571</sup> The employment strategy emphasises the need for employers in the borough to ensure they eliminate actual or potential barriers to employment for marginalised groups in the borough as a way of promoting equal opportunity and social inclusion. What the strategy fails to understand is that the failure to deal comprehensively with the issue of negative treatment and harassment by employers may not only be potentially litigious but could also account in part to the decision of some disabled employees not to continue in paid employment.<sup>572</sup>

### **1.1.3. Skills Development and Vocational Training.**

Skills development for persons with disabilities has been recognized as a key action point in the Southwark Employment Strategy and this could be anchored to the substantive equality paradigm from the twin perspectives of accessibility and sustainability or progression.<sup>573</sup> First, the lack of the appropriate skills and qualifications has been identified as one of the major barriers to the entry into the labor market by persons with disabilities.<sup>574</sup> Second, even where persons with disabilities are able to enter in to paid employment, their ability to

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<sup>571</sup> Harassment is currently outlawed by Section 26 Equality Act 2010. The prevention of harassment constituted a part of the general duty to promote disability equality under Section 49 (1) (b) DDA 1995.

<sup>572</sup> Equality and Human Rights Commission, Work fit for all – disability, health and the experience of negative treatment in the British workplace, Insight Report 1 Autumn 2008 available at

[http://www.equalityhumanrights.com/upload/work\\_fit\\_for\\_all.doc](http://www.equalityhumanrights.com/upload/work_fit_for_all.doc) •

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<sup>573</sup> It was clear from the officials interviewed for this study that, skills development here include increasing the aspirations of persons with a disability seeking to enter in to paid employment and their awareness of the value of skills to them and their families while co-locating services to make them more accessible and convenient for this group of citizens.

<sup>574</sup> DRC, Disability Agenda: Creating an Alternative Future, February 2007 available at [www.disabilityagenda.org](http://www.disabilityagenda.org). (accessed June 2006)

stay in and progress in the employment could be hampered by discrimination in the employer's policies on vocational training.<sup>575</sup>

Two main features could be identified as underpinning the approach of Southwark council to the development of job related skills and vocational training for persons with disabilities in the borough. First, the council has adopted mainstream positive measures to promote skills development and vocational training to encourage the entry into the labor market of marginalised groups such as persons with disabilities. The Southwark Work Force Strategy 2008-2011 has been developed to provide a common approach for dealing with all equality strands and this integrated, cross-strand approach is important because it does not only support the principle that there is no 'hierarchy' of discrimination but, most importantly is capable of addressing the multiple dimensions of the disadvantages suffered by persons with disabilities.<sup>576</sup> This approach has a particular resonance with the provisions of the Framework Directive<sup>577</sup> and has enabled Southwark council to develop a joined up approach by linking the skills development and vocational training for marginalized communities in the borough to the council's wider development agenda.<sup>578</sup>

Second, Southwark council has integrated the training and skills development of persons with disabilities seeking to move in to paid employment in to their 'Core Strategy Preferred Option' policy.<sup>579</sup> The core strategy preferred scheme does not only provide a focus on encouraging and supporting businesses in a rapidly changing market place to respond to needs highlighted by social and demographic change, including the needs of persons with disabilities and older people but it also develops the skills of these group of persons to reflect the complex needs of new employers attracted to the conurbation of developmental projects

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<sup>575</sup> Section 39 (2) (b) Equality Act 2010 prohibits discrimination in the opportunities for training offered by an employer to an employee.

<sup>576</sup> The work force strategy 2008-2011 was developed from the overall employment strategy 2005-2016 and is linked to the council's corporate plan 2009 as a key action point.

<sup>577</sup> The Framework Directive adopts a common approach to the outlawing of discrimination on the grounds of disability, sexual orientation and religion. See Council Directive 2000/78/EC of 27 November 2000.

<sup>578</sup> The London Borough of Southwark: Canada Water Action Plan. Employment Back Ground Paper March 2010 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>579</sup> See generally Southwark Council, Core Strategy: Employment Back Ground Paper March 2010 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

which are being executed in the borough. In fact, the ability of Southwark council to integrate skills development and the employment of persons with disabilities into its wider development agenda is best exemplified by the adoption of a growth areas approach which focuses development in town centre and areas with good public transport.

The council has prioritized development in such 'Central Activities Zones' as Elephant and Castle Opportunity Area, Peckham Action Area, Canada Water Action Area, Bankside, Borough and London Bridge Opportunity Area, Aylesbury Action Area, West Camberwell housing regeneration area and Old Kent Road regeneration area. Under this option new development projects, jobs, shops and community facilities would be concentrated in the growth areas, mostly in the Central Activities Zone which constitutes the core of the action areas and the opportunity areas. As these areas contain concentrations of the most deprived parts of Southwark this would have a positive impact on the employment of residents with disabilities who not only tend to live in the more deprived areas in the borough but whose mobility to work would be increased by the availability of enhanced transportation.<sup>580</sup>

Skills development and training are closely related to the issue of work placement and apprenticeship as providing a route to the labor market for persons with a disability. Southwark council has linked up with local contractors engaged in developmental projects in the borough to elaborate voluntary work and work experience policies and programs which, even though not focused primarily on persons with disabilities however provide this group of persons with the opportunity to acquaint themselves with the work environment and gain vital experiences that may impact on their equal chances of entering into and remaining in paid employment. For example, upon gaining membership in to the Bankside Logistics Forum, developers and contractors sign up to a specific commitment not only to provide employment opportunities to the residents but also apprenticeship and work placement opportunities to members of disadvantaged groups in the community such as persons with disabilities.

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<sup>580</sup> Ibid

#### **1.1.4. Socio-economic Advancement.**

A major theme that emerged from the analysis of the Southwark Employment Strategy and which appears to embody the concept of substantive equality is the commitment to advancing the socio-economic position of members of disadvantaged groups in the community, including persons with a disability by encouraging their entry and participation in paid employment. This commitment is encapsulated in the Strategy's central vision and highlighted in the council's corporate plan as a principal objective of 'Achieving Economic Well-Being.'<sup>581</sup> *A linked effect of this commitment is to prevent these groups of citizens from becoming long-term dependants on welfare benefits by building employability and learning culture amongst the population. A key feature of substantive equality is its commitment to bettering the socio-economic position of disadvantaged groups in the community by taking in to account their disadvantaged position in the formulation and implementation of policies.*<sup>582</sup>

Discrimination is much more likely to flourish when the economic and social consequences of unemployment are very manifest in daily social interactions. In this respect, the significance of the Southwark Employment Strategy to persons with disabilities may not only lie in its welfare effects but also in the opportunity it provides to participate in the mechanisms offered by society through which they may establish meaning for their lives, the connections of a community, and a sense of self-respect.

#### **1.2 The 'Southwark Works' Program**

Located within the broad framework of the council's Multi-agency Initiative (MAI) on 'worklessness' and the government's 'From Welfare to Work' policy, the Southwark Works project (SW) is a positive action program that has been instituted by Southwark council to help improve the chances of members of disadvantaged groups in the borough, including

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<sup>581</sup> Southwark Council, Corporate Plan 2009-11 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>582</sup> M. Wesson, 'Equality and Social Rights: supra no.09 pp748-769. S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21, *South African Journal on Human Rights* pp163 – 190. See also The South African case of The Government of the Republic of South Africa v Grootboom (2001 (1) SA 46) (CC).

those with disabilities wishing to enter in to paid employment through the provision of employment and training opportunities. The programme operates mainly from its two offices at Bermondsey and Elephant and Castle and provide support and guidance to those considered economically inactive or workless.<sup>583</sup> The project is staffed with a group of employment specialists who are supposed to guide and support beneficiaries of the program achieve their goals and ambitions. There are a number of qualifying criteria that potential beneficiaries must meet to qualify for receiving support on the programme. One of the main requirement is that the beneficiary must have a disability and unemployed.<sup>584</sup>

### **1.2.1 The Southwark Works program as Positive Measure.**

The SW is a positive action program as it is primarily focused on bettering the social and economic circumstances of members of marginalized groups in the community, including persons with disabilities by addressing their labor-market disadvantage. Policies developed in order to redress disadvantage, whether in the labour market or elsewhere, may be referred to as 'positive actions' where they do not only entail the preferential treatment of those disadvantaged by their group membership but also the taking of steps whose impact will be to ameliorate disadvantage associated with membership of these groups. Such policies recognise that disadvantage frequently tracks group characteristics such as disability and therefore takes these into consideration in the advancement of equality of opportunity.<sup>585</sup> Positive action measures have traditionally been recognized in the field of disability<sup>586</sup> and the Southwark Works program certainly demonstrates that Southwark council is alive to the need for positive action measures as a way of harnessing social support to achieve what Professor Quinn refers to as 'the main goal of both non-discrimination and social provision in

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<sup>583</sup>See generally Southwark Works at [www.southwark.gov.uk](http://www.southwark.gov.uk). As a provider of Employment Services under Section 55 Equality Act 2010, the Southwark Works project is under a duty to make reasonable adjustment with regard to its clients with a disability. See also Section 55(6). Equality Act 2010.

<sup>584</sup> Southwark Works Programme information sheet 2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>585</sup> A. Lawson, '*Disability and Equality Law in Britain*, supra no.68 pp.187-232. See also, K. Monaghan, *Equality Law*. (Oxford, OUP 2007) pp277-283.

<sup>586</sup> Equality Act 2010 Sections 158 and 159. Also Article 7 of The Framework Directive provides for positive action with regards to persons with disabilities.



the disability context namely to honour persons and create the conditions for their personal fulfillment and success.’<sup>587</sup>

As a program of support, referral and training, the SW provides its beneficiaries with a unique framework of support and guidance to overcome barriers to employment where such assistance is not provided by mainstream employment programmes.<sup>588</sup> The added value of the program may also lie in the fact that it runs alongside other mainstream employment support programs in the borough. These include:<sup>589</sup>

Jobcentre Plus (JCP);  
Learning & Skills Council (LSC);  
London Development Agency (LDA); and  
Work Directions or Reed in partnership.

### **1.2.2 Needs Assessments and the Concept of Difference.**

Central to the SW project is the needs assessments and evaluation exercise that is carried out on each jobseeker and provide the operational framework for the support provided to the beneficiaries.<sup>590</sup> There are three elements of the program’s operational framework which could be extrapolated and plugged on to the anchor of substantive equality for persons with disabilities.

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<sup>587</sup> G. Quinn ‘The European Social Charter and EU Anti-discrimination Law in the Field of Disability: supra no.42 pp 279-304.

<sup>588</sup> For example, Southwark Works provides financial assistance to its beneficiaries to cover expenses as the purchase of new clothes to attend interviews, travelling to and from job interviews etc.

<sup>589</sup> Information on skills and training at Southwark are available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>590</sup> The positive outcomes of the SW assessments scheme and training programme have been documented in ‘Substantive Evaluation:’ The Southwark Works Programme 2008, a research conducted by WM Enterprise available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

### **1.2.2.1 Person-Centered Assessment.**

A distinguishing feature of the SW support program is the intensive and highly individualised employment assessment of the beneficiaries of the program. The assessment and evaluation exercise contain in-built measures to investigate the marketable skills and abilities of the individual jobseeker with a disability through the analysis of his or her personal circumstances. This approach fits in to and reinforces the fact that the process for identifying a 'reasonable adjustment' must be an individualised and participatory one so as to enable the abilities of the individual with a disability to flourish.

There were two distinct features of the assessment exercise which could be extrapolated and linked to the promotion of substantive equality for persons with disabilities. First, the Southwark Works program recognizes that the assessments needed to add value to the chances of the applicant with a disability to gain employment by providing assistance in the preparation of curriculum vitae, interview techniques and job search. The assessment and evaluation is market sensitive to emerging opportunities and barriers that may present obstacles to the entry into the labour market of this group of persons.<sup>591</sup> Second, the concept of outcome as operationalised within the project means that the focus of the assessment is upon the goals or desired achievement of the jobseeker with a disability. The ideal of equality respects the choices of individuals about how they should lead their lives save the law should insist upon equal respect for those choices.

### **1.2.2.2 Flexibility and Autonomy.**

It is crucial to the attainment of substantive equality for persons with disabilities that the SW program is designed in such a way as to ensure that there is appropriate degrees of flexibility, autonomy and innovation in relation to intervention delivery. Flexibility of approach is encouraged by delegating to individual advisers sufficient levels of authority to make discretionary expenditure on relevant activity so that advisers can react to opportunities as they arise without having to wait for approval from the program's top management. For example,

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<sup>591</sup>According to one of the SW's employment advisers interviewed for this study, the assessment exercise is conducted in such a way as to take into account the need to make adjustments for both the individual with a disability and persons with disabilities as a group.

the program's operational funding allows the employment adviser to provide the particular beneficiary with financial assistance to meet with travel costs, Costs of new clothes for attending interviews and/or specialist training sessions. In other words, the program is not only operationalised in such a way as to take account of the personal circumstances of the individual jobseeker, including those with disabilities but also of the multiple barriers to accessing employment that persons with a disability face.<sup>592</sup> The significance of the financial flexibility of the SW program may lie not only in the recognition that discrimination is not the only barrier to the entry in to the labour market of persons with disabilities but that poverty and lack of financial support is a major contributory to the inability of this group of citizens to gain employment<sup>593</sup>. The Public sector duty on equality should provide the framework for programs such as the SW program to explore how social provisions could be used to achieve the ideals of non-discrimination and equality for persons with disabilities.

### **1.2.3 Partnership and Collaboration.**

At the core of the SW program is a partnership approach which has been an important element in ensuring the programme's successful innovation and flexibility.<sup>594</sup> Partnership and collaboration was identified as one of the principal arms of the Southwark Employment Strategy 2006- 2020 and was analyzed in this context from both the strategic and operational levels in order to provide a comprehensive outlook on the program's impact on tackling the labor market barriers to persons with a disability.

#### **1.2.3.1 Strategic Partnership.**

At the strategic level, the SW program is an integral part of the council's worklessness Multi Agency Initiative (MAI). The MAI is an informal partnership of organisations involved in the worklessness-related policy in the borough. The SW program does not operate in isolation but

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<sup>592</sup> Southwark Works Programme information sheet 2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>593</sup> The United Nations Convention on the Rights of Persons with Disabilities (CRPD) goes beyond issues of equality and discrimination to address the social and economic circumstances of persons with disabilities. See the preamble of the convention which acknowledges 'the profound social disadvantage' currently experienced by persons with disabilities and the fact that most of them live in conditions of poverty.

<sup>594</sup> See programme evaluation conducted by WM Enterprise. Supra no. 34.

as part of a wider information and referral network and this fact may be crucial in ensuring the long-term sustainability and viability of the program through providing a more joined up approach to employment. The Southwark Work's program have emerged from the borough's Employment Strategy and Enterprise Strategy (2005-2016) and are directly linked to the key actions identified in the Southwark 2016 Community Strategy. The employment element contains mandatory outcomes that reflect partnership priorities in targeting support at the most disadvantaged in the labor market and tackling the barriers to employment for this group of residents.

#### **1.2.3.2 Operational Partnership.**

At the operational level, the SW program is built and operates around a network of partner organizations and dedicated advisers based within the partner organisations who provide personal confidential support and specialist advice to the unemployed local residents who are beneficiaries of the program. These partner organisations have contracts with the SW programme to deliver specific outcomes which have been designed to fit within a coherent portfolio of projects. A linked effect of this partnership networking is an employment engagement element of the program which involves the provision of public and private sector work placements. At the center of the work placement are the Employer Liaison Officers (ELOs) who are based at and work directly with service providers. This arrangement allows the Employer Liason Officers to deepen their knowledge of the particular needs of each beneficiary of the program by providing them with immediate contacts and engagement with the target employers.

#### **1.2.4. Work Placement and Vocational Training**

An important feature of the Southwark Works program is the opportunity it offers through the work placement scheme for vocational training to the beneficiaries of the program. Voluntary work and work experience schemes could be considered as some form of positive action. In the case of disability, such measures may encompass the preferential treatment of persons with disabilities. Those seeking practical work experience as part of a vocational training are covered by the provisions of the Equality Act 2010. Section 55 (1) of the Act makes it unlawful for providers of employment services

to discriminate against a disabled person seeking or undertaking a work placement. On its part, section 55(7) imposes a duty on employment service providers to make reasonable adjustments.

The proactive approach of the Southwark Works program towards providing voluntary work and work placement opportunities to persons with disabilities does not appear to be replicated at the organizational level by Southwark council as a major employer in the borough. According to a manager in the corporate organization department, The level of participation of persons with disabilities in voluntary work and work placement programs with the council is very minimal and that this could be attributed partly to the fact that there had not been any determined drive by the organization to engage with this group of persons. This relative absence of persons with disabilities doing voluntary work or work placement with Southwark council could amount to a failure to discharge its duty to promote equality for this group of persons.

## **2.0 Job Advertisement and Recruitment.**

### **2.1 Job Advertisement.**

Job advertisement has a particular significance to persons with disabilities seeking to enter into paid employment. First, given their history of relative social exclusion it is often through job advertisements that persons with disabilities may become aware of the existence of employment opportunities or job vacancies. Second, Job advertisements are made to the public at large and have a group disadvantage dimension with regard to the duty to make reasonable adjustment. This may contrast with the individualized reactive reasonable adjustment duty under section 39(5), EA 2010.

Third, job advertisement has the power to create and reinforce human barriers to employment and therefore is potentially a means by which Southwark council could perpetuate the exclusion of persons with disabilities from their employment. Most of the staff with a disability of Southwark council interviewed for this research appeared to confirm that the council's policy on job advertisements could be a principal barrier to the take up of employment with the Council by persons with disabilities. This concern was explicitly

mentioned in the report on the council's consultations to inform the drawing up of its Equality and Human Rights Scheme 2008-2011.<sup>595</sup> This was an important data that emerged during this research, especially as it may provide an explanation or understanding as to why less persons with disabilities are entering into the employment of the Council than are leaving.

### **2.1.1 General Policy Framework**

The approach of the London Borough of Southwark to job advertisement within the council is reflected principally in the Council's Workforce Employment Strategy 2008-2011 and the Recruitment Advertisement Strategy 2009-2011.<sup>596</sup> The aim of job advertisement is to enable the Council to identify and ultimately recruit in to its workforce, the best candidate for the job. Job advertisement is therefore a mechanism for making rational decisions on staff recruitment. Three principles of action could be extrapolated from the import of the Council's strategy. First, since the purpose of the advertisement is clearly to identify the best applicants for the job, the advertisements must aim at reaching the widest possible pool of candidates, including persons with disabilities. Any advertisement strategy based on prejudice towards the abilities and talents of persons with disabilities would hardly be considered as rational. An advertisement strategy that excludes persons with disabilities will simply be denying the council of the opportunity to make a rational assessment of the marketable skills of this group of citizens. Thus, by ensuring that the advertisement policies and practices of public authorities are focused much more rationally on reaching out to applicants with disabilities and discovering their abilities, the ideals of non-discrimination and equality encapsulated in the public sector equality duty have the potential of contributing to the corporate rationality of the authority.

Second, the Council's advertisement strategies would have to be adjusted to take reasonably into account the difference of disability. Job advertisement constitutes an arrangement made under s39 (1) EA 2010 for the purpose of determining to whom an employer should offer employment.

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<sup>595</sup> Report on the consultation for the drawing up of the Equality and Human Rights Scheme 2008-2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>596</sup> Both documents are available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

However, while a job advertisement is an arrangement which has the potential to be discriminatory, the duty to make adjustments with regard to job advertisements only arise if and when the disabled person is, or has notified the employer that he may be, an applicant for that employment.<sup>597</sup> In other words, the employer's knowledge of the applicant's disability may provide the conceptual link between the employer's advertisement strategy and the duty to make reasonable adjustment.

Third, job advertisement provides a mechanism through which the council could establish a pool of future recruits and an informed basis for future appointments. A job advertisement may require applicants to make disclosures about their disabilities and this may amount to an employer making a health enquiry under section 60 of the Equality Act 2010. This point has a particular relevance to Southwark council which operates an E- mail Alert system which enables individual jobseekers to register with the council's on line job search services so that they could be alerted immediately of any available job opportunity which corresponds with their ambitions.<sup>598</sup> The information provided online includes details about the applicant's disability.

### **2.1.2 Building an Inclusive Work Force through Job Advertisement.**

An underlining principle of the corporate employment policy of Southwark council is to develop an inclusive work force which represents the diversity of its residents.<sup>599</sup> A linked effect of this principle of inclusivity is the requirement that the strategy applied for job advertisement must be able to reach-out to all potential jobseekers, including those with disabilities. One way by which Southwark council is attempting to achieve this goal is through regular features in targeted publications for persons with disabilities and through a coordinated website Investment in driving candidates to the job site through web banners, posters, pay per click and Google Search.

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<sup>597</sup> Schedule 8 Part 3 Equality Act 2010. A similar provision was contained in the DDA 1995, Section 4A (3).

<sup>598</sup> For more information about the Southwark job alert system, see generally [www.Jobsatsouthwark.co.uk](http://www.Jobsatsouthwark.co.uk).

<sup>599</sup> See the council's equality and diversity statement and Work Force Strategy 2008-11 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

### **2.1.3 Online Job Advertisement**

This research was informed that Southwark council intends to adopt the internet as its preferred and only medium for job advertisement in the future. This may probably signify a policy shift towards a high tech approach to its employment and service delivery. Most of the jobs advertised by Southwark council are already done on the council's website and this may be indirectly discriminating against and substantively disadvantaging some persons with disabilities who may wish to enter in to the council's employment. First, research has established that over 40 percent of persons with disabilities in the UK are low skilled and may not be able to integrate in to the changing technological environment. Second, This concern is even greater in the case of Southwark council where the employment policy places very limited emphasis on the development of Information and communication Technology for persons with disabilities.

If it is the case that the adoption of the generic on- line job advertisement disadvantages persons with disabilities with regard to employment, then it is difficult to see how the council will be able to effectively meet its target on the employment of persons with disabilities, especially as the work force statistics indicate that more persons are leaving than are entering the employment of the council. Public bodies must monitor their work force and show how their policies and practices impact positively on the recruitment, development and retention of employees with disabilities. This employment monitoring provision has been identified as a major advancement of the legal protection afforded to persons with disabilities in the field of employment as it goes beyond the conventional requirement of employers to refrain from discriminating against persons with disabilities and to impose on them a duty to positively promote their entry in to and retention in employment.

### **2.1.4 Equality Versus Cost Considerations**

Costs consideration is an important element in the advertisement strategy of Southwark council which may provide in part an explanation for the decision of the council to adopt the online advertisement as the main method of job advertisement. The strategy commits the council to a ten percent yearly cut on advertisement expenditures, a consequence of which has been the inability of the council to pursue targeted advertisements for persons with



disabilities. Also, there is greater emphasis on advertising for generic roles rather than individual posts. All advertisements for multiple roles below grade 9 in support services and related functions (Human Resources, Finance, and Administration) will be generic as from 2010/11.<sup>600</sup> Given the fact that these are posts likely to be occupied by persons with disabilities, it is safe to conclude that it is this group of persons who are most likely to be affected adversely by the cuts, confirming the assertion that the costs factor is the 'hidden but powerful agenda behind much of equality policy and that, when faced with financial squeeze, policymakers would readily sacrifice equality in the alter of costs considerations.'<sup>601</sup>

## **2.2 The Recruitment and Selection Process.**

It is often at the selection stage that discrimination against persons with disabilities seeking to enter in to employment is likely to occur, due partly to stereotyping and the absence or inadequacy of training on disability awareness on the part of those conducting the selection.<sup>602</sup> It was clear during this research that the selection process for employment in to Southwark council is a formidable barrier to the take up of employment with the council by persons with disabilities. Surely, it is central to reversing this that the needs and experiences of this group of citizens should be carefully considered. This would enable barriers encountered by persons with disabilities to be dismantled, if necessary through targeted measures such as the guaranteed interviewing scheme or the job split strategy.<sup>603</sup> This research examined the broad spectrum of the recruitment and selection process of Southwark council and was able to identify certain themes which could provide a more fundamental understanding of how the law could connect with an organization's policies and practices to create the reality of disability equality in employment.

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<sup>600</sup> See generally Southwark Council's Advertising Strategy 2009-2011.

<sup>601</sup> S. Fredman 'Disability equality: A Challenge to the Existing Anti- Discrimination Paradigm?' supra no.8pp. 199-218.

<sup>602</sup> Professor Quinn has pointed out that disability discrimination could arise from the use of proxies or stereotypes as to the assumed characteristics of persons with disabilities. See generally, G. Quinn, supra no. 38.

<sup>603</sup> S. Keen and R. Oulton, *Disability Discrimination in Employment* (Oxford, OUP 2009) p.74. The job split strategy is applied by the London Borough of Southwark and involves splitting a job to accommodate the disability of an applicant.

### 2.2.1 Short Listing and Priority Interviewing

An important data that emerged from this research is the fact that Southwark council operates a policy of priority interviewing for all applicants for a job vacancy with the council who have a disability.<sup>604</sup> One of these commitments is to interview all applicants with a disability who meet the minimum criteria for a job vacancy and to consider them on their abilities.<sup>605</sup> Priority interviewing is a form of positive action as it amounts to more favourable treatment for applicants with a disability and may represent a willingness on the part of Southwark council proactively to encourage the take up and retention of employment with the council by persons with disabilities. In other words, the policy is an implicit recognition that, in certain instances persons with disabilities may be disadvantaged at the point of selection of candidates and that a policy based on equal treatment may only serve to perpetuate the disadvantage.

This study noted that job applicants are routinely asked by Southwark council to state on the application forms whether they have a disability and this may amount to making a health enquiry under the Equality Act.<sup>606</sup> The Act allows employers to make health enquiries in certain circumstances, including for the purpose of making adjustments for the applicant and for establishing whether an applicant has the capacity to perform the intrinsic functions of the job. Health enquiries could also be made to enable the inclusion of the applicant in a pool of applicants to be considered for selection in the future.<sup>607</sup> Information provided by job applicants about their disability is used by Southwark council to select candidates for priority interviewing. In fact, by requiring job applicants to disclose their disability, the policy may operate to put the council on notice of which applicant has a disability for the purpose of meeting the council's duty to make reasonable adjustments under the Equality Act 2010. The implication here is that, in an action for discrimination Southwark council may

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<sup>604</sup> The council is an accredited member of the Two Ticks Disability Symbol which is a recognition by the Employment Service that Southwark Council is committed to meeting five commitments regarding the recruitment, employment, retention and career development of persons with disabilities. For details on the priority interviewing, see generally, [http://www.southwark.gov.uk/info/200041/equality\\_and\\_diversity](http://www.southwark.gov.uk/info/200041/equality_and_diversity).

<sup>605</sup> Southwark Council, Guide to Recruitment. See also Southwark Council's Equality and Diversity Statement, both documents available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>606</sup> Section 60 (1) (a) and (b) Equality Act 2010 prohibits an employer from making enquiries about the health of an applicant.

<sup>607</sup> Section 60 (6) Equality Act 2010.

not be able to plead the defence of lack of knowledge of an applicant's disability once the disability has been notified in the application form.<sup>608</sup>

Knowledge of a claimant's disability by the defendant is a central element in establishing liability for both direct disability discrimination and unfavourable treatment under Sections 13 and 15 EA 2010 respectively. Also, the duty to make reasonable adjustment in the employment context is reactive and knowledge that the interested disabled person has a disability is required for the duty to be triggered.<sup>609</sup> There were two issues of principle which emerged in this study regarding the policy of Short listing in the context of equality for persons with disabilities. First, information about an applicant's disability disclosed in the application form could be used to refuse him or her the job applied for. In other words, health enquiries may provide the causal link between an employer's ability potentially to make reasonable adjustment for persons with disabilities and the decision by the employer to offer or refuse to offer him or her a job. This researcher was reliably informed by a manager of the council that, in certain instances, the council has had to *Use the Selection panel to effect a decision made through the back office system to refuse to appoint an applicant with a disability despite the fact that she performed brilliantly at the interviewing and had been shortlisted on the basis of her disability. The manager confirmed that the underlining reason for the back office decision was simply that it would be financially very burdensome on the council to accommodate a hard to hear employee at a time of financial cuts in the council.*

Second, it was not clear during this research whether the council's adherence to the two tick policy had any real impact on the chances of persons with disability to gain employment with the council. The council's appointment policy states clearly that appointments to the council are on merit and it is difficult to see how priority interviewing will cause an individual with a disability who does not meet the minimum criteria or is incapable of performing the intrinsic functions of the job to be given the job. In fact, the policy may operate to give the applicant

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<sup>608</sup> Ridout v TC Group [1998] IRLR628EAT; also, Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] IRLR 613.

<sup>609</sup> Schedule 8 Part 3 Equality Act 2010. A similar provision was contained in the DDA 1995, Section 4A (3).

with a disability false hopes if at the final selection the more qualified non disabled candidate is selected for the job.

### **2.2.2 The Requirement of Merit**

An important aspect of the recruitment policy of Southwark council is the requirement that the selection of the candidate for the job advertised is made on merit and that a candidate may be appointed to a relevant post only if they are judged to be the best qualified person in terms of the ability to perform the essential functions of the job.<sup>610</sup> This policy is linked to the provisions of the Local Government and Housing Act 1989, s7 which makes it mandatory that all appointments by local authorities be made on merit. Southwark council has operationalised the concept of merit from two interrelated perspectives which could impact on the promotion of substantive equality for persons with disabilities.

#### **2.2.2.1 Knowledge of the Applicant**

The notion of merit is framed around the knowledge and experience of the candidate and Lends itself to assessment via the information provided by the applicant in the application form or a c.v. The focus here is on measurable performance in conventional systems of qualifications and the candidate's abilities are judged mainly by reference to exam grades and professional qualifications which are likely to be neutral in terms of impairment. This perspective of meritocracy appears to be based on a notion of formal equality in which membership of a disadvantaged group is irrelevant. Its potential to disadvantage persons with disabilities may lie in the fact that it fails to appreciate the fact that the lack of qualifications by an applicant with a disability may be due to past discrimination in the educational system or the legacy of segregation. The effect of the requirement of merit in this context would imply a rejection of any form of positive discrimination in recruitment in terms of more favourable treatment for applicants with disabilities over a more qualified non-disabled applicant for the job.<sup>611</sup>

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<sup>610</sup> Southwark Council Guide to Recruitment. (Unpublished).

<sup>611</sup> For the link between the merit principles and disability, see generally A Lawson, *supra* no. 68 pp187-232. See also C .McCrudden, 'Merit Principles' 18 Vol. 543 1998 *OJLS* P.559-62.

### **2.2.2.2 Competences (Aptitude and Skills)**

The second perspective of merit as operationalised by Southwark council in the context of recruitment is framed around the notion of competences (Knowledge and skills) and is aimed at determining the most promising candidate in terms of motivation and talents. Competencies are personal attributes that someone brings to a job / activity. They are observable behaviors that spring from skills, abilities, personality and motivation. The emphasis here is not on neutrality but on helping individuals' overcome barriers created elsewhere because of their personal profile.<sup>612</sup> In the context of disability, such an approach could be aligned to substantive equality as it recognizes that simply ensuring that the doors to employment are fully open to all may not be sufficient to enable persons with disabilities to participate, if, due to historic or current disadvantage or discrimination, they lack the qualifications or experience that is needed to go through the doors. In other words, rather than ignoring the applicant's disability, it treats it as a relevant factor in the operationalisation of the concept of merit. In this respect, the study noted that Southwark council has developed Competency frameworks for certain categories of staff which are capable of taking in to account the fact that, even though persons with a disability may not have the academic qualifications as their non-disabled counterparts, they may have unique skills and abilities which they could bring to a job that will be beneficial to the organisation.<sup>613</sup>

### **2.2.2.3 The Merit Principle and the Duty to make Reasonable Adjustment**

The requirement to appoint 'on merit' could have major implications not only on the rights of persons with disabilities to enter in to and progress in employment with Southwark council but also on the council's ability to discharge the duty to make reasonable adjustment. First, the requirement does not exclude the council's duty under the EA 2010 to make adjustments to its selection policy so that the 'merit' of persons with disabilities must be assessed taking into account any such adjustments which would have to be made.

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<sup>612</sup> Southwark Council BM Guide to Recruitment (Unpublished).

<sup>613</sup> The categories are; Strategic Managers, Professionals Business Managers, Technical Staff, Unit Managers, Administrative Staff, Supervisors, Customer Contact Staff and Direct Carers.

Second, the requirement of merit may be particularly significant with regard to the job description since the merit of the applicant is assessed against the requirements of the job as contained in the relevant job description.<sup>614</sup> Third, since the merit of the applicant depends on his or her ability to perform the intrinsic functions of the job, the intrinsic functions of a job may themselves constitute the provision, criterion or practice which triggers a reasonable adjustment duty. Professor Quinn has commented on the conceptual relationship between the reference to 'essential functions' in Recital 17 of the Framework Directive and the duty to make reasonable accommodation under Article 5 of the Directive.<sup>615</sup> First, the reference highlights the point that the search for a particular 'reasonable accommodation' should be an interactive one between the employer and the individual with a disability. In this respect, Southwark council will need to identify carefully the 'intrinsic functions' of a given job and to distinguish them from marginal functions. If Southwark council over-conflates the 'intrinsic functions' of a job and if an applicant with a disability cannot comply with the requirements of the job because of his or her disability and is not offered it as a result, this would amount to unfavorable treatment within the meaning of the EA 2010, Section 15 unless Southwark council can justify the job requirements which it has laid down as a proportionate means of achieving a legitimate aim. Second, the relationship is also relevant to the kind of 'reasonable adjustment' that Southwark council might be required to make with regard to the merit of applicants with disabilities. In this respect, Professor Quinn suggests that (if the marginal or non-essential functions of a job could be transferred to another employee in order to enable an employee with a disability to perform the 'essential functions' of the job then such 'reasonable accommodation' might be required.) This study was informed that Southwark council has a strategy of (Job-split) which is applied as a way of operationalising the duty to make reasonable adjustment for persons with disabilities.

The DDA did not explicitly specify that an applicant with a disability must be able to perform the 'essential' or 'intrinsic' functions of a job in order to gain the protection of

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<sup>614</sup> L. Waddington, 'Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion' supra no. 281 pp 115-17. Also, K.Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' December 2003 Vol.32 No. 4 *Industrial Law Journal*.pp253-273.

<sup>615</sup> G Quinn, Disability Discrimination supra no. 38 pp231-277. (p.264).

the statute. Rather, in *Archibald v Fife Council*<sup>616</sup> the House of Lords held that the DDA 1995, to the extent that the provisions of the Act required it, permitted and sometimes obliged employers to treat a person with a disability more favorably than others. This may even require transferring them to a higher level or position without the need for a competitive interview if that would remove the disadvantage the person with a disability would otherwise face and, in appropriate cases, creating a new post in substitution for an existing post. This could be contrasted with the positions under the Framework Directive and the Equality Act 2010 where there are references to 'essential functions' and 'intrinsic functions'. According to Article 5 of the Framework Directive, 'reasonable accommodation' in the form of 'appropriate measures' shall be taken only 'where needed in a particular case which is stated in Recital 17 as being those who can perform the 'essential functions' of a job with or without 'reasonable accommodation'. On its part, the Equality Act 2010 permits an employer to make disability-related health inquiries in order to establish whether an applicant with a disability would be able to perform the intrinsic functions of a job, with the relevant reasonable adjustments in place.<sup>617</sup>

While the provisions of the EA, 2010 and the Framework Directive with regards to the duty to make adjustments may give rise to legal arguments regarding the 'intrinsic functions' and 'essential functions' of a job and thus bring to question the conventional understanding of the notion of 'merit', it may be the case that a proper and rational scrutiny as to what are the intrinsic or essential functions of a job as opposed to merely the conventional or preferred ways of undertaking it could assist Southwark council in challenging systemic and attitudinal barriers to the employment of persons with disabilities.

### **2.2.3 The Selection Panel and the Role of the Back-Office System In The Recruitment Process.**

It was apparent to this study that the recruitment process of Southwark council is managed principally by two structures whose operations could determine the extent to which the

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<sup>616</sup> (2004) UKHL 32; (2004) IRLR.

<sup>617</sup> Section 60(6) (b), Equality Act 2010.

council is able to promote substantive equality for persons with disabilities in the recruitment process. The two structures are the Human Resources department working through the selection panel and the back-office system which operates from the department of Corporate Organisation. Analysing the relationship between the two structures was important because it provided the study with a practical framework for understanding how the anti-discrimination and equality ideals reflected by the Public sector equality duty could be incorporated into an organization's corporate structures. The data that emerged from the study with regard to the recruitment structures were analyzed from three main dimensions.

First, the study scrutinized the background assumptions of the management thinking that underpins the operations of the Selection panels and the back-office systems in order to highlight the main issues of principle that should be addressed if the law is helpfully to adapt to the equality trend in management thinking. In this respect, it appeared there were two perspectives that constituted the underlining assumptions; the legal perspective grounded in the anti-discrimination law module and operationalised by the Selection panels and the equality and diversity perspective championed by the back-office system. Exploring these perspectives enabled the study to identify some tensions between the equality and diversity model and the legal model. It also provided an insight in to how the reactive duty to make reasonable adjustment could be reinforced by an anticipatory approach in dealing with the issue of institutional discrimination.

The role of the selection panel is principally to conduct an assessment of the suitability of the job applicants within the framework of anti-discrimination laws and to ensure the selection of the best candidate for the job. The essential feature of their approach, referred to in this thesis as the 'legal approach' is the prioritization of the notion of equal treatment by requiring that similarly situated applicants be treated in the same way. In the same vein, the approach is rooted in the reactive reasonable adjustment framework and could be aligned to the concept of direct discrimination which has the potential to overlook the fact that "much of the institutional discrimination on the ground of disability arises through the unquestioning acceptance of long established practices or encrusted layers of unexamined



presuppositions.”<sup>618</sup> However, the prohibition of discrimination includes both direct and indirect discrimination and the added value of indirect discrimination is that it is capable of reaching systemic issues of discrimination not normally covered by the prohibition against direct discrimination.

It was apparent to this study that the legal approach of the selection panel may potentially conflict with the role of the back-office system. Apart from its monitoring and auditing role, The Back-office system has the challenge of translating the council’s corporate objective of building an inclusive workforce into concrete initiatives while ensuring that legal changes in anti-discrimination are converted into an opportunity for debate and innovation within the council’s recruitment process. This approach has been referred to as the ‘equality approach’ and is underpinned by the anticipatory approach to the duty to make reasonable adjustment. It may therefore be the case that the back-office system operates to enable the council’s recruitment processes to be integrated with its processes for ensuring compliance with existing anti-discrimination law. This has the beneficial effects of avoiding tension between strategies that encourage a culture of negative legal compliance and those which promote a proactive approach to promoting equality. For example, by Using the back office system which is staff with Diverse personnel involved in equality and diversity initiatives, a selection panel could anticipate the types of adjustments that may be appropriate to the circumstances of the candidates to be interviewed. In this way, the selection panel could be able to develop an informed approach to recruitment and the duty to make reasonable adjustment that is robust to legal challenge in terms of both direct and indirect discrimination.

Second, it was apparent during the study that one of the possible methods for integrating the legal and equality perspectives in the context of disability is the participation of members of selection panels in organizational structures for decision-making aimed at promoting equality. In this respect, it was noted that the activities of the selection panel did not only traced through to the mechanisms for decision-making of the back-office system but also that each of the structures provided for a system of accountability in the

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<sup>618</sup> G. Quinn, *supra* no. 38, p.260.

recruitment process. For Example, individual members of the selection panel were responsible not only for grading the performance of candidates at the interview but were also accountable for ensuring that interview notes and assessment records were integrated into the general appraisal framework of the back-office system. In this way, members of Selection Panels were afforded the opportunity to share their thoughts and experiences with the back-office system in order to develop proactive strategies to promote equality.

Third, the study explored the relationship between the selection process and the council's policy on equality training because it provides a link between policy and practice in the context of job recruitment. The equality training was also considered as an important mechanism for integrating the reactive and anticipatory reasonable adjustment duties in the field of employment. The policy of Southwark council with regards to recruitments is that everyone involved in recruitment decision, including selection panelists should be trained in equality and diversity issues.<sup>619</sup> The thrust of the equality training *is partly* to enable panelists recognise when they are making stereotypical assumptions and to be proactive in anticipating what adjustments may be appropriate in particular circumstances in the conduct of interviews. It is submitted that this requirement that Selection Panelists undergo training in equality is of immeasurable importance in the disability context where the very term disability is taken as a proxy for inability to perform the essential functions of a job. It may be the case that the integration of the legal and equality perspectives will only be achieved by re-looking at the focus and the skills of the selection panellist, especially with regard to their ability to manage change in a manner that welcomes innovation and embraces new ways of assessing candidates.

### **3.0 Using Equality to Achieve Workplace Harmony**

One of the aims of this study was to investigate the capacity of the Public sector equality duty to assist in the realisation of greater workplace equality and harmony. An important backdrop to the section is the provision of Recital 16 of the Framework Directive which states that the provision of measures to accommodate the needs of persons with

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<sup>619</sup> See BM's Guide to Recruitment.

disabilities in the workplace plays an important role in combating discrimination on the grounds of disability.

### **3.1 The Induction Process**

The induction process constitutes an important dimension to the ability of persons with disabilities to enter in to and retain employment with any organisation. If employees with disabilities feel that they are being discriminated against at this early stage of their employment, then there will be a higher-than-average chance that they will leave. This obviously has a particular significance to Southwark council where the employment monitoring statistics indicate that more persons with disabilities are leaving the council's employment than are entering.<sup>620</sup> The induction process was considered from two perspectives

#### **3.1.1 Norm-setting and Fitting-in**

Essentially, the induction process of new employees to Southwark council is focused partly on introducing the employees to the organizational structures for achieving the corporate agenda. The process entails a detailed explanation of the workings of the organization and carries with it an implicit acknowledgment that it is the organisation, not just the individual, which needs to be adaptable. This aspect of the induction process of Southwark council is very significant to new employees with a disability as it is likely that where the induction process is capable of providing the new employees with a deep understanding of the council's work, that will put them in a good position to recognise obstacles and impediments to equality and to identify workable means of achieving change.

It was important to the research that the induction process was especially permeable to equality thinking owing to the fact that it is at this stage that the employee's work plan is commenced and integrated in to the council's performance management framework. In other words, by linking the induction process to the performance management framework,

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<sup>620</sup> Southwark Council, Annual Work Force Report 2008-09 and 2009-10.

Southwark council may be promoting the realization of substantive equality not only by fusing the goals and ambitions of the individual employee in to the corporate agenda but also by ensuring that adjustments made to accommodate employees with disabilities are not assessed only from the perspective of management thinking.

### **3.1.2 Induction as Equality Training**

This study considered the induction process of Southwark council within the context of its policy on equality and diversity training. The council has instituted an equality training which is conducted for all new employees of the council at the start of their employment. This general training could be crucial in the council's ability to promote equality in the context of disability. First, it provides an opportunity for both the organization and the employees to focus attention much more rationally on what the employee with a disability has to offer rather than their impairment. Also, the training could help mitigate against workplace discrimination arising from a feeling of superiority on the part of non-disabled employees and thus promote workplace harmony.

Second, the induction training establishes a link between disability awareness training and the training in the workings of auxiliary aids provided by the council and thus assist the staff with a disability to maximize the benefits of such devices. Third, Southwark council has reviewed its induction training and has included to its remit a tour of the borough by all new staff. The Borough Tour project involves new staff being given a tour of the borough by coach. Participants are made to visit certain strategic areas in the borough which could advance their understanding of the different equality and diversity challenges encountered by the council. Up to five existing employees of the council are allowed to participate in the Borough tour and to share their experience on equality and diversity with the new recruits, thereby promoting harmony in the working environment. The most recent tour was in March 2010 and included a visit to the offices of Community Action Southwark (CAS).

### **3.2 Performance Management**

Southwark Council recognises that substantive equality for its employees with a disability is not limited to the removal of barriers to their entry in to the organisation's employment but that they be given the opportunity to develop and progress in employment. In this respect, the council has developed and implemented a Performance Management Scheme which provides a framework for recognising and enhancing the contributions made by individuals working for the organisation. The scheme is the only mechanism used by Southwark council to appraise employee job performance and to determine incremental awards.<sup>621</sup> This study identified from the Southwark council Performance Framework certain important principles of action which could be linked to the substantive equality paradigm.

#### **3.2.1 Performance Management as Participation**

A central theme encapsulated in the performance management framework of Southwark council and espoused by the Positive duty to promote equality is that of participation. Performance management creates a framework for dialogue between managers and individual members of staff which is capable of giving structure and uniformity to the concept of participation. In other words, performance management in Southwark council is not simply a mechanism for employee appraisal and promotion by management but is a structure for promoting equality through employee participation in a wider system of norm setting and implementation capable of identifying and removing real or anticipated barriers to the ability of persons with disabilities to participate in employment.

A salient feature of the performance management framework which is capable of adding value to the concept of participation as an instrument for delivering substantive equality is the fact that it is a continuous process of dialogue and scrutiny which enables employees & managers to convert the organization's aims into individual objectives. One way by which Southwark council is achieving this is to Use the performance management

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<sup>621</sup> See generally Southwark Council's BM's Guide to performance management (unpublished).

framework to manage the constant technological changes which may operate as a barrier to the continued stay in employment of persons with disabilities.

### **3.2.2 Framework for Individual Flourishing**

The Performance Management Scheme links performance and the drive for continuous improvement and service excellence by providing a rigorous approach to defining, assessing and rewarding achievement in the workplace. This approach lends itself not only to a commitment on the part of the council to facilitate the learning and career development of the employees, including those with a disability but also to the possible adoption of positive measures to assist those disadvantaged by their group characteristics overcome whatever barriers that may stand on the way of their career progress.

In the light of the above, this study identified two principles contained in the PMS framework of Southwark council which could be plugged to the substantive equality paradigm espoused by the Positive duty to promote equality. First, managers of the council must secure the cooperation and involvement, not only of the employee with a disability but also that of the entire workforce. Such a cooperation and involvement may depend on a high trust work environment. This is because it is only in such a context that each individual's potential will have the possibility of flourishing. However, it is likely that the requisite level of trust will not exist unless the employees with a disability believe that the commitment of management to their flourishing is genuine.

Second, performance management must value difference by recognizing that people's different backgrounds will impact on how they deliver work and the contribution that they can make to the progress of the organisation. In the case of employees with a disability, there is the need to make reasonable adjustment in order to accommodate the difference of disability. A linked effect is that any adjustment should ideally be made in consultation with the employee. However, as was pointed out in *Cosgrove v Caesar and Howie*,<sup>622</sup> the duty to make reasonable adjustments is not limited to adjustments identified or

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<sup>622</sup> [2001] IRLR, EAT paras 8 and 9.

suggested at the time of the performance appraisal by the employee. This underscores the point that performance management is a continuous dialogue between the organization and the employee with a disability.

### **3.2.3. Continued Professional Development (CPD).**

A core element in the council's Performance management framework is the provision of opportunities for continued professional development by the council to the staff. However, this study was able to conclude that persons with disabilities are not benefiting equally from the opportunities and this may amount to unlawful discrimination under s39 [2] [b] EA 2010. Certain factors appear to contribute to the situation; First, though opportunities for further training may impact on the promotion chances of persons with disabilities working with the council, there appeared to be a general reluctance by some of the staff with disabilities to enroll on further training programs offered by the council. This may be due partly to a feeling of lack of confidence on the part of some of the staff with disabilities who do not believe that they may be able to cope with the demands of the training in addition to their contracted duties. However, a more subtle point lies behind this observation; Southwark council as an employer must not discriminate in selection for training and even though a staff with a disability might not apply for training because he or she thinks that he or she may not cope with the training as a result of his or her disability, that is not an excuse for the council not to consider him or her for the training in question in the first place. Failure to do so could well amount to discrimination.

### **3.3 Capability Management**

This study considered the capability management framework of Southwark council from the broad spectrum of policies and practices that are designed to assist and encourage the employees of the council to achieve and maintain acceptable standards of efficiency, attendance at work and work performance generally. However, particular attention was given to three areas of work concern which were identified during the study as having direct impact on the promotion of substantive equality for persons with a disability. This approach was important because it exposes some of the tensions between the individualistic and group approaches to disability equality.

### 3.3.1 Absence due to Sickness.

The one area where Southwark council can demonstrate a proactive approach to achieving substantive equality for employees with a disability is with regard to absences from work due to sickness. This is important not only because of its potential to create an unequal playing field as regular attendance at work may be more difficult for some persons with disabilities than for their non-disabled colleagues but also because of the legal and managerial difficulties engendered by the relationship between sickness and disability. As an appropriate backdrop to the legal position, the ECJ confirmed in *Sonia Chacon Navas v Euest Colectividades SA*<sup>623</sup> that the Framework Directive did not confer protection against discrimination solely on the grounds of sickness and that an employee who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by the Directive.

However, while sickness is not synonymous to disability as the vast majority of persons with disabilities do not have any illness, it does not necessarily mean that sickness cannot also amount to a disability. Also, there is no doubt that absence from work due to disability-related sickness may lead to reduced levels of overall economic activity. Thus, there is an imperative to strike the delicate balance between the twin impulses of upholding the demands of the employer to have an employee perform the tasks for which he or she is employed to do and the provision of measures to accommodate the needs of persons with disabilities at the workplace. This point is buttressed by Recital 16 of the Framework Directive which states that the provision of measures to accommodate the needs of persons with disabilities in the workplace plays an important role in combating discrimination on the grounds of disability

The issue of absences due to sickness by employees with a disability was analysed from two related perspectives; sick pay and the process of managing the absence. In relation to sick pay, the study established that Southwark council does not generally treat sickness as a disability and thus absence due to sickness would entitle the employee only to his or

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<sup>623</sup> SA (Case C-13/05[2006].



her contractual sick pay over and above the statutory sick pay scheme which apply uniformly to all employees, whether disabled or not. The statutory sick pay scheme provides for a minimum payment from the fourth day of sickness for up to 28 weeks. This study was unable to obtain any documentary evidence on the contractual sick pay of the employees of the council but was, however, reliably informed that if an employee is unable to work due to sickness he or she will continue to receive full pay for three months and then half pay for the following three months, after which any payment is discretionary. It is regrettable that the position of Southwark council appears to build on the judicial reasoning in the Chacon Navos case which not only demonstrated a lack of understanding of the interaction between disability and social processes but also that it is the absence of sensitivity in such processes to disability that prevents persons with disabilities from entering and staying in employment.<sup>624</sup> However, it is contended that such an apparently neutral provision or practice based on the notion of equal treatment or treatment as consistency may be indirectly discriminatory if it puts or would put persons with a disability at a particular disadvantage compared with other persons and thus be inconsistent with the notion of substantive equality encapsulated in the positive duty to promote equality.

In fact, dispute have arisen between employers and employees with a disability where sick pay has been reduced, notwithstanding that the reduction has been in line with the employer's sick pay policy which apply equally to employees with a disability and those without a disability. The disputes have related to the exact relationship between the duty to make reasonable adjustment and the payment of full sick pay in instances of absences due to disability-related sickness. In *Nottinghamshire County Council v Meikle*<sup>625</sup>, the Court of Appeal addressed the extent of an employer's obligation to continue paying full sick pay to an employee with a disability beyond the requirements of the employer's normal policy. Based on the facts of the case, the court held that, since the cause of the claimant's absence from work was the Council's failure to make reasonable adjustments, the placing of the claimant on half pay put her at a substantial disadvantage. The court reasoned that, in the particular circumstances of the case, A reasonable adjustment would have been to maintain the claimant's sickness benefit at full pay. The fact that the Council reduced her sickness benefit to half pay was therefore a failure to make a reasonable adjustment which amounted to discrimination under Section 5(2) of the DDA 1995.

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<sup>624</sup> G. Quinn, *supra* no. 38 pp231-277.

<sup>625</sup> [2004] EWCA Civ 859.

The decision in *The Meikle's* case could be contrasted to the Court of Appeal decision in *O'Hanlon v The Commissioners for HM Revenue and Customs*<sup>626</sup> where it was held that the sick pay rules of an organization constituted a provision, criterion or practice which could potentially place an employee with a disability at a disadvantage and thus trigger a duty to make reasonable adjustments. However, the tribunal emphasized that it would be only on a 'very rare case' that an employer will be obliged, as a reasonable adjustment, to give more sick pay to an employee with a disability than it would otherwise give to a non-disabled employee who in general does not suffer the same disability-related absences. The EAT commented that such an obligation would mean that Tribunals would be entering into a form of 'wage fixing for employees with a disability and would fall foul of the purpose of disability discrimination legislation, which is to assist persons with a disability to obtain employment and to integrate them into the workforce. The EAT also stated that the DDA is designed to recognise the dignity of the disabled and to require modifications which will enable the disabled to play a full part in the world of work, not to treat them as an 'object of charity'.

In relation to the process of managing absence due to sickness in Southwark council, the issue relates to the 'trigger points' that lead to the commencement of the council's capability procedure. In this respect, the question whether disability-related absence should be counted towards the trigger points will depend on whether the management action is a disciplinary action or a capability procedure. The importance of the difference between the two may be found in the degree of flexibility contained in the standard applied to each. disciplinary action is decided on the basis of "the balance of probability" rather than "beyond reasonable doubt", whereas capability action relies on "matters of fact" and the question to be answered is whether the employee did or did not reach specific attendance targets.<sup>627</sup>

The flexibility inherent in the capability management framework of Southwark council is based on a realization that the achievement of substantive equality can only become a reality where some reasonable allowance is made for disability in order to enable the abilities of

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<sup>626</sup> (2006) IRLR 840 (EAT)

<sup>627</sup> Southwark Council, Business Manager's Guide to Capability Management (unpublished).

employees with disabilities to be put to work. This is reflected most in the guidance to managers that capability management should encompass a flexible approach to the legal definition of disability.<sup>628</sup> The capabilities approach to absence from work due to disability-related sickness should be seen as a framework for assessing the extent to which illness could inhibit the development of the capabilities of employees with disabilities. At the least, the Capability Management Framework of Southwark council appears to recognize the point that it is the interaction of disability with social processes and the absence of sensitivity in such processes to disability that constitutes a barrier to persons with disabilities entering and staying in employment. Unfortunately, the use by the ECJ in the *Chacon Navas case* of a *positive norm* in the Framework Directive to restrict the scope of the definition of disability will only serve to hinder the participation of persons with disabilities in the labour market.

### 3.3.2 Flexible Working

The right to flexible working or the right of individual employees to change their working time or pattern of work has been recognised in several European countries as a way of promoting substantive equality in the workplace.<sup>629</sup> In the UK, the right to request flexible working is limited to employees who have responsibility for a child aged under six, or a disabled child under 18.<sup>630</sup> The purpose of the right is to give parents of young and disabled children the opportunity to adopt working arrangements that help them balance their commitments at work with their caring responsibilities. Legally, the right to request flexible working entails the employee making an application to the employer for a change in their terms and conditions of employment which relates to such provisions as the place, time and hours of work they are required to work. The change constitutes a permanent change to the employee's terms and conditions and neither the employee nor employer has an automatic right to revert to the previous terms and conditions of employment. However, employees are

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<sup>628</sup> Ibid

<sup>629</sup> A. Hegewisch, Flexible Working Policies: A Comparative Review a Research by the Institute of Women's Policy Research. (Equality and Human Rights Commission Research Report 16, 2009)  
ISBN 978 1 84206 108 4. Also available at [http://www.equalityhumanrights.com/uploaded\\_files/research/16\\_flexibleworking.pdf](http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf)

<sup>630</sup> Section 80F of the Employment Rights Act 1999 (ERA).

only entitled to request a change in their terms and conditions of employment if they have been continuously employed by the employer for at least 26 weeks.

The failure of the government to extend the statutory right to flexible working to all employees, especially those with disabilities undermines the efforts to promote substantive equality and non-discrimination in employment by adapting the workplace to meet the needs of all employees. Adapting the workplace means ensuring that work practices meet the needs of all employees to enable them to be as productive as possible while avoiding any risk to health or safety. Flexible working is an important strategy not only in adapting the workplace to meet the needs of employees with disabilities but also in combating discrimination on the ground of disability.<sup>631</sup> The Framework Directive is built on an understanding that inadequately adapted workplaces, workstations and work organisation design are forms of discrimination in the employment context.

The statutory right to request flexible working aside, Southwark council must also be aware that it may amount to unlawful indirect discrimination to refuse to accommodate the request for flexible working of an employee with a disability. This is because, by requiring all employees to work full-time regular hours, Southwark council would be applying a provision, criterion or practice which puts employees with disabilities at a disadvantage as compared to other employees who are not disabled because persons with disabilities are more unlikely to be able to work full-time regular hours due to their disability. More relevant in the context of discrimination is the fact that the refusal to grant a request for flexible working from an employee with a disability would amount to a failure to make reasonable adjustment under section 20, Equality Act 2010. In this context, it is to be noted that the object of the requirement to make reasonable accommodation under Article 5 of the Framework Directive is stated to be to 'enable a person to have access to, participate in, or advance in employment or to undergo training'. Significantly, Recital 20 of the Directive establishes that adapting patterns of working time would constitute an appropriate measure of accommodation.

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<sup>631</sup> Recital 16, The Framework Directive which states that the provision of measures to accommodate the needs of persons with disabilities in the workplace plays an important role in combating discrimination on the grounds of disability.

This study was able to establish that the flexibility inherent in its Performance and Capacity management framework is enabling Southwark council to take a positive approach to flexible working which may be consistent with the overall objective of promoting substantive equality for its employees with disabilities. This is seen in the fact that, in principle the council has extended the right to request flexible working to all employees, including those with disabilities. The policy could be linked to the substantive equality paradigm not only because it promotes a better work-life balance across the whole workforce and has a positive effect on recruitment and staff retention but most importantly because it represents what people want and expect from workplaces. With regard to employees with disabilities, adapting the workplace would necessitate responding to any disability-related problems as soon as they become apparent and not to wait until it is established that an employee meets the legal definition of disability before putting in place reasonable adjustments. In the case of absence from work due to sickness, allowing lengthy periods of sick leave to elapse before enquiring whether or not steps can be taken to enable an employee with a disability to return to work undermines the potentials of 'reasonable adjustment to tackle such inadequately adapted workplaces and thus reduce the chances of attaining substantive equality for persons with disabilities in employment.

### **3.3.3 Harassment and Negative Treatment at Work.**

An important data that emerged from this research is that harassment and negative attitude from non-disabled employees is part of the experience of staff of Southwark council with disabilities. The issue of workplace harassment and negative attitude was a recurrent theme in the interviews conducted with some of the staff of Southwark council with disabilities and was on the agenda of one of the meetings of the Unison-Disabled Staff Group of the council which was attended by this researcher. The staff of Southwark council with disabilities complained of experiencing different types of negative treatments, some of which may meet the definition of harassment under the Equality Act 2010. Section 26 of the Equality Act 2010 prohibits harassment on similar terms as the DDA 1995. However, the scope of section 26 goes further than the DDA by including sexual harassment or conduct of a sexual nature in the workplace.<sup>632</sup> According to the Equality Act 2010, a person subjects a person with a

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<sup>632</sup> Section 26(2)(a) and (b)

disability to harassment if he or she engages in, in relation to the disability, unwanted conduct which has the purpose or effect of

- (a) Violating the disabled person's dignity, or
- (b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for him.<sup>633</sup>

Harassment and negative attitude towards employees with disabilities is a common phenomenon in our workplaces. The 2008 British Workplace Behaviour Survey found that employees with disabilities and those with long-term illnesses experience more negative treatment in the workplace compared to their non-disabled counterparts and that such treatment may frustrate the Government's (From Welfare to Work) policy by deterring persons with disabilities from entering in to, or remaining in employment. The Research further established that workplace harassment of staff with disabilities may be from managers, non-disabled work colleagues and even customers.<sup>634</sup> The management of Southwark council, especially the Human Resources department was not willing to discuss the issue of workplace harassment and negative treatment of the council's staff with disabilities by colleagues who are not disabled, probably because of the possibility of legal action being brought against the council. However, what this study found most worrying is the fact that the management appeared to be taking no action to deal with the situation. The impression which emerged from the interviews with the HR managers was that the management of Southwark council treated most of the complaints of negative treatments by staff with disabilities as trivial complaints which did not require any intervention by the management. In some instances such as when the staff with a disability complained of constant taunting by non disabled staff on the use of the lifts in the Tooley street offices, the HR managers appeared to insinuate that the complaints arose from the failure of the staff with a disability to develop and maintain good inter-personal relationship with other staff members and work colleagues.

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<sup>633</sup> Equality Act 2010 Section 26 (1).

<sup>634</sup> Equality and Human Rights Commission, supra no 18.

The apparent failure of the management of Southwark council to deal comprehensively with the complaints of negative treatment and harassment by its staff or employees with disabilities may have serious implications on the council's ability to promote the ideals of equality and non-discrimination for this group of persons. First, the failure may be potentially litigious under section 26 of the Equality Act 2010 and may expose the council to costly litigation in the law courts. Within the context of the duty to make reasonable accommodation under Article 5 of the Framework Directive, it is worth noting that the persistence of harassment and negative attitude against employees with disabilities may amount to a failure of Southwark council to take appropriate measures to enable person with disabilities to have access to, participate in, or advance in employment. Second, the harassment and negative treatment may account, in part, for the decision of some staff with disabilities to leave the employment of the council.

Most of the staff of Southwark council with disabilities interviewed for this study confirmed that workplace harassment and negative treatment by colleagues who were not disabled may be a reason for any decision to leave the employment of the council. If this is a true representation of what is actually happening in Southwark council, then there are three implications that could be extrapolated for the benefit of other public bodies that may be encountering the same phenomenon amongst their staff. First, if an employee with a disability is not made to feel comfortable and confident during his or her employment, there will be a higher-than-average chance that they will leave. This may in part explain why more persons with a disability have been recorded as leaving the employment of Southwark council than are entering. The council's annual employment monitoring report data confirm that over 2 percent more staff with disabilities left the council's employment in the two preceding years than they entered in to it. The implication is that Southwark council has been unable to meet with its target to increase the number of persons with disabilities in its employment as stated in its Disability Equality Scheme.

Second, the failure of the council to deal with the complains of workplace harassments and negative treatment may amount to a failure of the council to discharge its duty under the Equality Act 2010 and may thus trigger the intervention of the CEHR. The Equality Act 2006 granted the Equality and Human Rights Commission the power to assess the level to

which a public authority has complied with the general duty and to make recommendations as to what improvements need to be made. The commission also has the powers to issue compliance notice if the authority fails to respond adequately to any recommendations the commission makes with regard to the authority's discharge of the duty. The failure of an authority to respond appropriately to such a notice entitles the Commission to apply to the courts for an order requiring compliance.

Third, there is a conceptual link between the prohibition of harassment under the Equality Act 2010 and the promotion of the human rights of persons with disabilities. Harassment is considered by the Equality Act 2010 as constituting a violation of a person's dignity. Harassing a person with a disability means treating him or her differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Dignity is therefore both a human rights value and substantive equality and is central to the implementation of the statutory duty to promote Disability Equality by Southwark council.



## **Chapter Seven: Disability Equality, Service Delivery and the London Borough of Southwark.**

### **Introduction.**

The Equality Act 2010 recognises that discrimination against persons with disabilities is not limited to the employment field and that the right of persons with a disability to participate fully in the life of their community on equal terms with the rest of the population is affected by discrimination in the delivery of services.<sup>635</sup> However, the Public sector equality duty goes beyond the limited scope of discrimination to require the promotion of disability equality through broader policy framework of participation, independent living and choice for persons with disabilities.<sup>636</sup>

The purpose of this chapter is to assess the significance and potential of the Public sector duty on equality in the specific context of service delivery and to establish how the London Borough of Southwark is using the duty to promote the rights of persons with disabilities in the delivery of services. It considers not only how the policies and practices of the council fits into the statutory framework but also how the ideals of non-discrimination and equality can be imported into the delivery of goods and services. The chapter has been framed around four broad themes which emerged from the field work that was carried out to inform this study. The chapter begins by taking a snapshot analysis of the council's existing information and communication framework in order to understand how Southwark council communicates with customers with a disability about the arrangements that exist for them and the accessibility of its services, as well as any procedures which the council may have for consulting customers with a disability about their needs. Then we look at the council's equality awareness training which should generally be a continuous process of learning and interaction between the staff of the organisation and the realities of disability equality. We finally proceed to consider the extent to which Southwark council is using its position as a

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<sup>635</sup> Discrimination in the provision of goods and services is prohibited under Part 2 of the Equality Act 2010. Part 3 of the Disability Discrimination Act 1995 dealt with discrimination in the provision of goods and services. With regard to the position under the DDA, see generally B. Doyle, *Disability Discrimination: Law and Practice*. (Jordan Publishing 2008).

<sup>636</sup> A. Lawson, *Disability and Equality Law in Britain*: supra no. 121.

major purchaser of goods and services to oblige organisations doing business with it to respect and promote the rights of persons with a disability. There is some overlap between each of these themes. What they share in common are those rights-based concepts of participation, equal opportunity, reasonable adjustment, independent living and choice with the ultimate aim of promoting substantive equality for persons with a disability.

## **1. Achieving Substantive Equality through Information and Communication**

Developments in information and communications technology offer opportunities for persons with disabilities to participate fully in the life of their communities but also present the risk of new patterns of disadvantage emerging with regard to the delivery of services by public authorities.<sup>637</sup> This probably explains why, in the context of the London Borough of Southwark communications with both its staff and service users with a disability was a top priority in the consultations which preceded both the Disability Equality Scheme (DES) 2006 and the Equalities and Human Rights Scheme 2008-11.<sup>638</sup>

### **1.1 The Customer Services Improvement Strategy and the Notion of Equal Treatment.**

Developed within the broad framework of the Southwark 2016,<sup>639</sup> the Customer Services Improvement Strategy (CSIS) sets out the council's vision for understanding the customer experience through information and communication and maps out strategies for providing quality customer services to persons within and outside the borough who may want to use the council's services.<sup>640</sup> Three broad principles of policy could be identified which could be linked to the substantive equality paradigm.

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<sup>637</sup> Equalities Review, Fairness and Freedom (London, Stationary Office, 2007). Available at [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk).

<sup>638</sup> Report on the Consultations to inform the Development of the Southwark Equality and Human Rights Scheme 2007. Available at [www.Southwark.gov.uk/equalities](http://www.Southwark.gov.uk/equalities).

<sup>639</sup> Southwark council: Sustainable Community Strategy(Southwark 2016) is the main strategic plan for the borough's development. Available at <http://www.southwarkalliance.org.uk/southwark2016>.

<sup>640</sup> Southwark council's Customer Service Improvement Strategy 2008(unpublished)

### 1.1.1 The Principle of Consistency.

The strategy is framed within the concept of consistency, giving the impression that the council's policy is based on a policy of equality as consistency or equal treatment.<sup>641</sup> This point is reinforced by the fact that Southwark council does not operate a specific policy of informing persons with disabilities of new or existing council services as opposed to the general communication with the residents of the borough. In other words, Southwark council may appear to operate a generic information policy which is primarily concerned with equal treatment and where uniform rules do not only create identical choice sets but also ensure that opportunities are equal.<sup>642</sup>

There is a difference between equal treatment and treatment as equals or substantive equality in the disability context. Equal treatment requires only a crude evaluation of whether two people or actions are sufficiently 'the same' that they merit similar treatment. Treatment as equals, by contrast, involves a substantive and more flexible conception of equality.<sup>643</sup> Treatment as equals is a manifestation of commitment to the view that persons with disabilities are entitled to equal concern and respect from the State. Such a commitment will require treatment which is not identical in situations where treating everybody in the same way would demonstrate a lesser degree of concern and respect for persons with disabilities because of their particular circumstances.<sup>644</sup> In this respect, a strict adherence to the duty to promote equality for persons with disabilities would dictate that the focus of implementation must not be on whether any 'deviation' from equal treatment is permitted by the councils customer services communication strategy but instead on whether any deviation are consistent with equal concern and respect for this group of persons.<sup>645</sup>

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<sup>641</sup> See generally Southwark Council Customer Service – Equal Treatment, Complaints and Arbitration and The Southwark council's Publication Scheme which makes reference to the notion of equal treatment; Available at [www.Southwark.gov.uk](http://www.Southwark.gov.uk).

<sup>642</sup> J. Squires, 'Negotiating Equality and Diversity in Britain: Towards a Differentiated Citizenship?' December 2007, Volume 10, Issue 4, [\*Critical Review of International Social and Political Philosophy\*](#). Pp. 531 – 559.

<sup>643</sup> R. Dworkin, *A Matter of Principle* supra no. 91 pp. 190-98 and 205-13. See also N. Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) Vol.24 Oxford Journal of Legal Studies pp. 693-4.

<sup>644</sup> A. Lawson supra no. 68.

<sup>645</sup> H. Collins, 'Discrimination, Equality and Social Inclusion' supra no.133 p.16.

It was important for the purpose of this research that principles and policies be linked to managerial thinking in order to understand fully the context in which the law operates.<sup>646</sup> In this regard, the study was able to establish that there is a correlation between the principle of consistency and the standardisation of service delivery in terms of the council's governing framework. The study was able to identify three action points which could be crucial to promoting the rights of persons with disabilities to non-discriminatory treatment by Southwark council in the delivery of services:

- First the principle of consistency implies adopting a joint-up approach to service delivery. The different departments and Service areas of Southwark council work to deliver customer services across departmental boundaries using a consistent framework which is monitored and measured in a consistent way.
- Second, empowering frontline staff who interact with the public through effective, appropriate training on equality and systems management so that they should be able to deliver a consistent standard of service to the customer.

Third, the council has created a customer services team underpinned by a unified governance arrangement not only to provide frontline staff with the support and guidance to deliver a consistent service but also to monitor progress on how the services are being delivered.<sup>647</sup>

Another important point of principle that emerged from the study was the fact that some of the staff of the council understood consistency in terms of uniformity in the standard of service delivered by the council. The implications here which could be linked to the definition of discrimination against persons with disabilities are twofold; first, the council's policies must be implemented consistently in such a way as to ensure that persons with disabilities are not delivered with a standard of service which is lower than that provided to other members of the public. Second, the council may not refuse to make available to persons with disabilities services which are available to all other members of the public.<sup>648</sup>

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<sup>646</sup> See generally L. Barmes and S. Ashtiany, 'The Diversity Approach to Achieving Equality: Potentials and Pitfalls' *Industrial Law Journal* December 2003, Vol. 32, pp.274-296.

<sup>647</sup> Southwark Council's Customer Services Improvement Strategy October 2008.

<sup>648</sup> Section 27 (2), Equality Act 2010

### **1.1.2 Using customer experience to fix the system and to tailor service delivery to take account of difference.**

Understanding the experience of persons with disabilities and designing policies and practices to give effect to this experience in order to achieve equality of outcome is at the heart of substantive equality.<sup>649</sup> This point is reflected in the council's service delivery strategy which is framed around the principle that covering the whole customer experience, not just the experience that comes through the 'front office' or 'customer services' and using measures and analysis which provide insight into this experience with the organisation is critical to promoting the rights of the residents to equal treatment in the delivery of services. The customer experience may operate from two levels: the individual and the group level. This dualism may expose the conundrum between individual needs satisfaction and the group dimension to service delivery which underpins the positive duty to promote equality.<sup>650</sup>

The principle of 'tailoring services to meet customer need' is an aspect of the Southwark policy which has the potential of delivering substantive equality to persons with disabilities. First, the principle recognises the complex relationship between equality and difference which is central to an understanding of the equality duty on disability.<sup>651</sup> Second, the principle seems particularly suited in the disability context as it acknowledges the need for adjustments which is central to substantive equality for persons with a disability. Third, the principle is rooted in a disaggregated approach to data collection and analysis in service delivery, taking cognisance of the fact that persons with disabilities are not a homogenous group and that a failure to recognise difference within the group may in fact perpetuate discrimination. This approach demonstrates a concern to recognise heterogeneity within disability categories and also encourages the use of such innovative techniques as customer segmentation and graded response in order to identify which groups of customers predictably need which services over which channels. Disability disaggregation can provide service planners with insight into the spectrum of the needs of persons with a disability in the

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<sup>649</sup> S. Fredman and S. Spencer, 'Equality: towards an outcome-focused duty' *supra* no.102. See also T. Rees, *Mainstreaming Equality in the European Union*, (London: Routledge 1998).

<sup>650</sup> A. Lawson, *supra* no. 68. See also L. Barmes and S. Ashtiany, *supra* no.646 pp.274-296.

<sup>651</sup> S. Fredman, *Discrimination Law*, *supra* no.2 See also C. O'Cinneide, 'A New Generation of Equality Legislation?' *supra* no. 2 pp219-248.

community, helping service planning and delivery to move away from a 'one size fits all' approach.

A core element in the Southwark strategy to tailor its service delivery to meet the different needs of its population is the Proactive provision of information on service and service requests.<sup>652</sup> A proactive approach to communications entails the council providing information to its service users, including persons with disabilities on what services to expect, how to access the services and how services are being delivered. It involves the council actively pushing information to the residents about its services and not waiting for the customer to request or make enquiries before information is provided.. There are various ways by which the council makes known to its residents the services it provides; by its website, telephone enquiries, publications in newspapers or newsletters and face-to-face contact between the staff of the council and the service user.<sup>653</sup> This research was informed that, even though there is an increasing trend towards the use of telephone and e-mail or internet methods by persons with disabilities, face-to-face contact is the dominant method of communication between service users and the staff of Southwark council with regards to the provision of goods and services. It may therefore be the case that most persons with disabilities are likely to learn about the services provided by the council through face-to-face contact with council staff rather than through the website or telephone inquiries.

The principle of 'fixing the system' require staff to think not only about the presenting customer problem but how to 'fix the system' to prevent the same problem or similar problems arising in the future. The strategy is based on 'three levels of 'fix', reflecting an understanding that equality in service delivery is about processes, systems and outcomes. The strategy encapsulates an advancement of the rights of persons with disabilities in two principal ways: first, the concept of fixing the system appears to capture the essence of the

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<sup>652</sup> See Southwark council's 'Ten golden rules' for customer services' contained in the council's Consumer Services Improvement Strategy 2008-10.

<sup>653</sup> See for example Southwark Housing News which is distributed to every council tenant and leaseholders every two months and Southwark Life which is distributed to all households in the borough and is published and has ten editions per year. Available at [http://www.southwark.gov.uk/info/200109/council\\_news/1386/southwark\\_life/2](http://www.southwark.gov.uk/info/200109/council_news/1386/southwark_life/2).

anticipatory reasonable adjustment provisions in that it requires the staff of Southwark council not only to address the needs and concerns of the disabled person who presents himself in front of them but also to think in advance of all the possible barriers that may stand in the way of persons with disabilities who may want to use the services of the council in the future and to seek ways to eliminate them. In other words, the strategy like the anticipatory reasonable adjustment duty requires that policies and practices be scrutinised in order to eliminate any discriminatory element that may adversely affect the ability of the disabled residents in the borough to use the services of the council on equal terms as all the other residents.<sup>654</sup> Second, the concept embodies the cultural transformation of our public authorities envisaged by the legislation.<sup>655</sup> There is a shift in staff thinking, from simply curing a problem to one of prevention. This may require staff to work not only with managers and other colleagues but also with persons with disabilities in a participatory and collaborative framework to help create a process where this shift from curing to prevention could be actualised in an organised and systematic way that meets the council's overall objectives.

### **1.1.3 Prioritising Web-based Technology in Service Delivery**

The council's strategy definitely reflect a determined policy shift away from the face-to-face contact to an increasing use of the IT and website technology as the primary means of communication and service delivery. This shift is encapsulated in the concept of Channelled Migration which is cardinal to the council's customer services strategy and has been rationalised on the basis of costs-effectiveness and managerial efficiency. However, the shift may indicate an emphasis by Southwark council on the promotion of personal responsibility on the part of service users to seek information on what services they may wish to access. This may amount to an ideological undermining of the legitimacy of the right to

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<sup>654</sup> Section 29(7) Equality Act 2010 places public authorities under similar reasonable adjustment duty to that imposed on providers of goods and services by Section 29 of the Act. For details on the anticipatory reasonable adjustment duty under the DDA 1995, see generally A Lawson, *supra* no. 2 Pp. 92-126 and 155-185.

<sup>655</sup> 'Beyond Good Intentions: 'A resource for Local Authorities Implementing the Disability Equality Duty' 2006. Produced by the Office of Public Management (OPM) in conjunction with the Disability Rights Commission available at [http://www.equalityhumanrights.com/uploaded\\_files/PSD/38\\_beyond\\_good\\_intentions.pdf](http://www.equalityhumanrights.com/uploaded_files/PSD/38_beyond_good_intentions.pdf)

information as an entitlement.<sup>656</sup> Inequalities of access to information frequently lead to inequality of outcomes.

The emphasis being laid on the use of IT by Southwark council resonates with developments in the European Union where Important new initiatives in the disability field include a new 2005 EU strategy on accessibility. The main objective of the strategy is 'to promote a consistent approach to eAccessibility initiatives in the Member States on a voluntary basis, as well as to foster industry self-regulation'.<sup>657</sup>

Three action points were identified by this study which could link the council's policy shift to its ability to promote equality in the delivery of services. First, there has been an installation of new systems and technologies within the council. This can be evidenced through the effective use of CRM and the optimize bookings software which is fully operational in the council. Furthermore, an integrated front office IT system, including the one touch system has been installed. Second, an intensive, across the board training program for all staff in the customer services department, with particular emphasis on frontline staff has been conducted in the council to ensure that staff are familiar with and are able to use effectively the new systems in order to deliver an efficient and customised service to customers. Third, there is a policy emphasis by the council to use the website as a site for publicity in terms of service delivery and the interaction between the council and residents and between the residents themselves.

Developments in information and communications technology offer opportunities for persons with disabilities to participate fully in the life of their communities but also present the risk of new patterns of disadvantage emerging. The internet, as an interface between citizens and the local authority, can deliver services and information directly to the individual. Southwark council delivers over 1000 different services to the public and it is likely that all or most of

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<sup>656</sup> I. Young, *Inclusion and Democracy*, supra no. 166 pp.52-77.

<sup>657</sup> COM (2005) 425 final, on eAccessibility, 13.09.2005.



these services will be delivered through the council's website.<sup>658</sup> In fact, such activities as booking appointments, searching for jobs, housing and applying for benefits is increasingly done online. For those who lack the skills or cannot afford to keep up with the pace of change, the financial and social cost is high.

#### **1.1.4 Auxiliary Aids and the accessibility of Information**

There is a continuum between providing information, ensuring accessibility to the information and the provision of auxiliary aids to persons with disabilities. Accessibility to information materials in other formats may be crucial in determining whether or not a person with a disability could be able to access and enjoy the services of Southwark council on equal terms with the non disabled residents of the borough. In fact, both the Southwark DES and the EHRS consultations reports identifies the lack of auxiliary aids such as Braille, Moon, British Sign Language and transcriptions as a serious barrier to persons with disabilities being able to receive information, make use of services and express their needs.<sup>659</sup>

Southwark council has made an important policy commitment through its Citizens Charter to provide information in other accessible formats to enable persons with disabilities access its services.<sup>660</sup> However, this research discovered that there are some interesting dilemmas in translating the council's Inclusive communication policy into concrete initiatives to bring about change in the circumstances of this group of persons. This may be a consequence of the difficulties of simultaneously anticipating and removing every barrier which may lay in the way of persons with disabilities accessing the council's services which group membership entails and responding to the needs of individual persons with disabilities. First, there is a relationship of cause and effect between the provision of auxiliary aids by the council and costs. It seemed that , to most of the staff of Southwark

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<sup>658</sup> Southwark council offers over 1000 services to the public, most of which are now published on the council's website at [www.Southwark.gov.uk](http://www.Southwark.gov.uk).

<sup>659</sup> Southwark Council, Disability Equality Scheme (DES) 2006 and Southwark Equality and Human Rights Scheme 2008-11; also see Report on the consultation carried out to inform the making of the 2008-11 Scheme available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities).

<sup>660</sup> See Southwark council's Citizen's Charter available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities).

council the issue of costs was one which influenced the manner or timing of the provision of auxiliary aids rather than whether the aid is provided at all.

Second, where such a service is rendered it is usually on an adhoc basis in response to an enquiry by a person with a disability. The rationale is that as the cost of producing materials in other formats such as Braille, audio etc is very high and there is not much demand for it, it would not make sense to produce the materials in any great volume. Financial costs may be an important consideration in this process but it is respectfully submitted that an approach which deliberately sculpts the provision of auxiliary aids in order to control costs is not consistent with the underlying goal of promoting the participatory rights of persons with a disability. Also, while persons with a disability should be expected to inform relevant authorities of their requirements, this should not absolve those authorities of all responsibility when the disability is known to them and the consequences of failure to act will be serious for the person with a disability. Equal treatment for persons with disabilities is not a special dispensation available only if booked in advance.<sup>661</sup>

Third, the amount of staff time involved in getting the material available in the relevant format was an important factor. Staff time here include not only the actual time staff spend assisting the customers with a disability but also management time spent identifying and investigating possible adjustments to improve access and time incurred in the learning process. Also, auxiliary aids were more likely to be available in those offices of the council where there is an employee with a disability, probably indicating a correlation between the employment of persons with disabilities and the provision of auxiliary aids for customer use by the council. It may be the case that personal inclination and drive may underline this trend or that the initiatives to provide auxiliary aids were driven by one person who took a particular interest in disability, perhaps because he or she has a disability or because they were aware of disability issues generally. This appeared to be the case with the corporate stock services where the presence and determination of a staff with a disability working in the service has been an important element in the council's investments on auxiliary aids. Also,

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<sup>661</sup> L. Clements and J. Read, 'The Dog that didn't Bark: The Issue of Access to Rights Under the European Convention on Human Rights by Disabled People in A. Lawson and C Gooding(eds) Disability Right in Europe: From Theory to Practice(Oregon, Hart Publishing 2005). pp.21-34.

the concerted efforts of the staff with a disability may be crucial as is the case with the Tooley Street office where the pressure from the staff with a disability in the building has forced the council to carry out an assessment of the building in conjunction with the RNIB and the RNID with a view of installing important auxiliary aids.

Fourth, it may be the case that the real threat to the promotion of equality for persons with disabilities in Southwark council with regard to the provision of materials in accessible formats emanates from the abuse of discretionary powers by some of the staff of the council who appear not to understand that the provision of auxiliary aids to persons with a disability who wish to use their services is a legal duty which the council must discharge and not one left to the discretions of its officials. If this is what prevails in our local authorities, then it is an unfortunate situation as it undermines the need for independence, autonomy and self dignity for persons with disabilities whose ability to participate in the normal life of the community must not be made dependent on bureaucratic exigencies.<sup>662</sup>

## **1.2 Linking Service Delivery to Needs**

### **1.2.1 The One Stop Shops and Call Centres.**

The one-stop shops and Call Centres were created in 2005 by Southwark council in order to reduce the costs of avoidable demand by reducing the number of face-to-face contacts and to improve communication between the staff of the council and its customers<sup>663</sup>. Their modus operandi is grounded on the understanding that the shops could provide a common avenue where residents could access advice and assistance with regard to all council services and have their needs met without the need for multiple face-to-face contacts between the customer and various staff of the council<sup>664</sup>.

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<sup>662</sup> R. E. Gooding, 'Welfare, Rights and Discretion' supra no. 493 p 230.

<sup>663</sup> See Customer Services Improvement Strategy. See also Southwark council, 'An Independent Review on the Equality and Diversity Framework of Southwark council' (Lord H Ouseley Report) 2005, p3 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>664</sup> Lord Ouseley's Report *ibid*.

Within the context of equality and discrimination, the one-stop shops may not only represent an institutional and cultural transformation in the approach of Southwark council to the delivery of services to the public but, most importantly demonstrates how legislative priorities could help define managerial thinking and priorities. Rather than seeing the provision of services to persons with disabilities as '*special or segregated arrangements, the One-stop shops adopts an integrated approach, confirming that equality for persons with disabilities could be achieved by designing services that could serve the whole population and not just those with impairment. The approach bear a particular resonance to mainstreaming which underpins the duty to promote disability equality.*<sup>665</sup>

In addition, the One-stop shops contain Call Centres to enable residents obtain by telephone information about the services that are delivered by the Council. This is an important policy and practice development for Southwark council as it fits into its general strategy of channelled migration which prioritises the use of the website and telephones over the traditional face-to-face contacts as a means of communications between the customer and the council.<sup>666</sup> The call centres handles approximately 180,000 calls per month from customers.<sup>667</sup> However, calls made to the centre are not free. This policy to charge on calls made to seek advice on the council's services could be potentially discriminatory and may even operate to prevent some persons with disabilities such as those with mobility difficulties from using the service. In fact, the policy may serve not only to enhance the sense of marginalisation and contingency which underpins the experience of persons with disabilities but could also demonstrate the myriad ways in which disability is constructed and reconstructed by the social environment.<sup>668</sup>

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<sup>665</sup> S. Fredman, 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?' *supra* no.8 Pp199-218. See also J. Bickenbach, 'Minority Rights or Universal Participation: The Politics of Disablement' in M. Jones and A. Basser Marks (eds) *Disability, Divers-ability and the Legal Change* (Kluwer Publishing 1999) Pp101-116. See also C. Foster, 'Equality Mainstreaming: Turning Theory into Practice' *Equal Opportunity Review* No110. *Equal Opportunity Review* 2002.

<sup>666</sup> Customer Service Improvement Strategy 2008.

<sup>667</sup> See Southwark council's 'Delivering Services at Your Door Steps' available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities) (January 2010).

<sup>668</sup> L. Davis, 'Riding with the Man on the Escalator: Citizenship and Disability' in M. Jones and L.A Basser Marks (eds), *Disability, Divers-ability and Legal Change* (Cambridge, Kluwer Publishing 199) pp65-74.

### **1.2.2 Joined Team Services-Linking Disability and Age in Service Delivery.**

The Joined Team Services represents an example of a proactive approach to service delivery for persons with disabilities by Southwark council. The service is a one-stop shop that was created to cater for the specific service needs of the elderly residents, many of who are disabled and who may be encountering difficulties accessing mainstream services of the council.<sup>669</sup> There is a relationship between disability and age and this fact has been recognised by the European Commission which stated in 2001 that age and disability provide the clearest and most consistent relationship across countries. The relationship between disability and age may be explained partly by the fact that the health conditions of individuals generally deteriorates with age and to the extent that the prevalence of disability increases with age, it is obvious that age and disability interact as operative grounds of discrimination.

The Joined Team service demonstrates how the concept of reasonable adjustment could be extended to the area of age in service delivery in order to achieve substantive equality.<sup>670</sup> It also demonstrates that the council is not only adopting an expansive definition of disability but is going beyond the requirement to facilitate access by ensuring that the principle of independent living and autonomy underpinned by a sense of dignity for the service user are built into its service delivery profile. the substantive approach to discrimination law can be regarded as animated by an objective, which is the progressive realisation of a society that is worthy of the dignity of its members. A substantive equality approach is more likely to take account of the realities of discrimination and attempt to compensate for the disadvantages suffered by some groups. It concerns 'taking an active attitude to dismantling the obstacles which stand in the way of equality. However, by framing its activities within the boundaries of the notion of dignity, Southwark council appears to acknowledge the fact that substantive equality may be pursued but equal worth may not be compromised in the process.

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<sup>669</sup> Joint Team Services, Equality Impact Assessment Stage 1 Report to the Equality and Diversity Panel (EDP).

<sup>670</sup> For a relationship between disability and age, see M. Sargeant, 'Disability and Age - Multiple Potential for Discrimination' (2005) *International Journal of the Sociology of Law* Vol 33 pp 17-33.

### 1.2.3 Expressing Concerns about the Council's services

The Southwark council's Corporate Complaint Policy is an important policy statement of the council's commitment to respond positively to the needs and expectations of its customers, including persons with disabilities. There are three dimensions to the policy which may have particular significance to the promotion of the rights of persons with disabilities to access and use the services of the council on equal terms with other residents of the borough. First, the policy outlines a 3-stage complaints procedure which enables complaints to go beyond the limit of the frontline staff who interacts regularly with persons with disabilities and to be addressed by the organization's top management. The approach opens a line of communication between and within the organizational hierarchy which can encourage the councils officers to recognize, review, and end discriminatory practices. In this way the complaints process may have a major and beneficial impact beyond the resolution of a particular complaint. However, this impact will be enhanced to the extent that the complaints machinery facilitates decisions on important policy changes.

Second, the policy is investigative rather than adversarial or conflictual. Its thrust is to lessen the risk of litigation by providing a conflict-resolution mechanism to address service users complaints before it degenerates in to litigation. This has a particular resonance with the aims of the positive duty which is essentially a change-management strategy aimed at generating a broader range of incentives and sanctions that reflect what motivates decision-makers and drives organisational priorities.<sup>671</sup> Furthermore, an investigatory approach may be preferable for the complainant with a disability who will not be put to the difficulty of proving whether or not the complaint is just or unjust.<sup>672</sup>

Third, the scope of the policy in terms of those who could make a complaint about the council's services is wide, going beyond individuals to include groups of persons and representative organizations. This is very important to persons with disabilities who are more likely to rely on their local representative organizations or their local councilors for advocacy

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<sup>671</sup> S. Fredman and S. Spencer, 'Towards an Outcome-Focused Duty' *supra* no.102.

<sup>672</sup> C. O'Cinnede, *A New Generation of Equality?* *Supra* no. 2. Pp219-248.

services in articulating and channeling their complaints, needs and experiences.<sup>673</sup> It is also significant that the complaint policy commits the council to promoting and assisting advocacy. It may be the case that, given its insistence on accountability and transparency, the public sector equality duty may lead to a high-complaint culture especially from representative community organizations who are likely to make recourse to judicial review processes, with its inherent potential for gridlock. The council's complaint procedures may provide a mechanism to prevent such an eventuality.<sup>674</sup>

## **2. Service Delivery and Organisational Learning**

### **2.1 Equality Awareness Training**

Staff training on equality issues was not only identified by the Southwark DES<sup>675</sup> as an action point but also constitute an important dimension in the ability of a Public authority to respond to the rights and felt needs of persons with disabilities. Staff training on disability equality could be linked to the anti-discrimination ideal.<sup>676</sup> Professor Quinn has pointed out that discrimination may be motivated by the use of proxies or stereotypes concerning the assumed characteristics of persons with disabilities. These proxies are usually highly inaccurate and diminish the dignity of the individual. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. Alternatively, persons with a disability may be treated negatively in part because of their historically low status in society which can give rise to feelings of superiority on the part of the staff of public authorities and the potential for paternalistic decision making. Staff training on disability does not only complement the anti-

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<sup>673</sup> DRC, *The role of independent advocacy in reducing inequality and improving the life chances of disabled people: The Disability Agenda-Creating an Alternative Future*. (Accessed April 2007). The DRC was dissolved in October 2007 and replaced by the Equality and Human Rights Commission (CEHR). Also, R. Banks, 'More than Law: Advocacy for Disability Rights' in M. Jones and A. Basser Marks (eds) *Disability, Diversity and Legal Change* (Kluwer Publishing 1999) Pp343-362.

<sup>674</sup> *Kaur & Shah v London Borough of Ealing* [2008] EWHC 2062.

<sup>675</sup> Southwark Disability Equality Scheme (DES) 2006 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

<sup>676</sup> G. Quinn, 'Disability Discrimination Law in the European Union' *supra* no. 38 pp231-277., Also, DRC, *Disability Discrimination Act 1995 Code of Practice: Rights of Access- Goods, Facilities, Services and Premises*, Para 6.12 and 6.18.

discrimination ideal by valorising the group identity of persons with a disability by eliminating prejudice and stereotype but also by ensuring that staff respect the autonomous right of persons with a disability to equal treatment and dignity.

### **2.1.1 Development of Staff competency**

The development of the skills, knowledge and competency on disability is a principal objective of the Southwark equality training and an essential element in the effective discharge of the public sector duty on equality by the council.<sup>677</sup> Following the introduction of the council's generic Equality Scheme in 2005 and the extension of the conduct of impact assessments by the staff from just racial equality to include all the other equality strands including disabilities, Southwark council introduced a 2-day intensive equality Competency training for all frontline staff and those above the grade of managers which was aimed at providing the staff with the knowledge and skills necessary to uncover the subtleties of disability discrimination not only in the performance of their duties but also in the conduct of equality impact assessments.<sup>678</sup> This was an important policy decision of the council which could impact positively on the rights of persons with disabilities especially when one consider the fact that the council had in 2005 decided to extend the conduct of impact assessments to all the equality strands.

The staff competency training on equality is significant because it demonstrates how organisational priorities could be merged with the public authority's duty under anti-discrimination to achieve substantive equality for persons with a disability. The assessment of a council's performance under the Equality Standards for Local Government explicitly includes equality, diversity and community cohesion. As part of the Standard's Comprehensive Performance Assessment(CPA), a local authority will need both a strategy for improvement and good management of the processes in order to show that it is capable of delivering services that meet 'need' and 'expectations' of it's service users. The Standard

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<sup>677</sup> Southwark Customer Service Delivery Strategy 2008(unpublished).

<sup>678</sup> Southwark council, Findings of the Consultation on the New Equalities Scheme (2006) Annex 6: Southwark Equalities Scheme 2005-08



places considerable emphasis on the establishment of key processes within the local authority to make equality a corporate goal.

Importantly, while the Standard is concerned with putting in place processes for the management of equality, it provides for ambition, leadership, resource management and service delivery outcomes. The staff training on equality is not only an important step in the ability of Southwark council to meet the requirements of the Standard but also reflects Commitment to a Comprehensive Equality Policy.

The equality competence training for managers and other frontline staff of the council is not only compulsory but constitutes an important element in their ability to discharge their functions. For example, a manager may not be able to become a member of recruitment panel if he or she has not undergone the relevant training.<sup>679</sup> Thus, by making disability awareness training an integral part of a manager's job requirement, Southwark council is embedding disability issues in the very fabric of its management structures.

### **2.1.2 Appraising Staff Awareness on Equality Duty**

One of the questions which this study attempted to answer was the level of awareness amongst the staff of the council of the statutory duty to promote disability equality. This was important because the council may be able to discharge effectively the duty only if the staff are aware that they are under a statutory duty to eliminate discrimination against and promote the rights of persons with disabilities. In other words, the effectiveness of a law is as much a function of the level of its awareness as it is its content.<sup>680</sup>

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<sup>679</sup> Southwark Council: Guide to Recruitment 2008.

<sup>680</sup> C. Gooding and C. Casserley, 'Open for All? Disability Discrimination Laws in Europe Relating to Goods and Services' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice*. (Hart Publishing, Oregon 2005) pp135-162.

The first UK Act to impose positive equality duties on public authorities generally was the Northern Ireland Act 1998 (NIA). Section 75(1) of the Act requires a broad range of public authorities to have 'due regard to the need to promote equality of opportunity. The NIA was followed in 2000 by S71 of the Race Relations Act 1976 (RRA) which imposed a statutory duty on certain public authorities to promote equality of opportunity and good relations between racial groups in the community. The S71 duty was passed in the wake of the MacPherson Report which exposed the extent of institutional discrimination in the police force. However, since the coming in to force of the DED in 2006, there has been some publicity amongst the staff of the statutory duty to promote equality by Southwark council.<sup>681</sup> Furthermore, there have been other developments outside the council such as the introduction of the public sector duty on gender equality and the establishment of the Commission for Equality and Human Rights (CEHR) by the Equality Act 2006, and the Single Equality Bill 2009 which projected equality issues to the top of the news agenda. Therefore, we would have expected to observe a high level of awareness of the DED not only among the managers and frontline staff of the council but also amongst the staff generally. Rather, it was discovered that, while some of the managers and the frontline staff interviewed for this study demonstrated convincing knowledge of the legislation, many of them did not know what the DED was about. Correspondingly, most of the staff, especially the managers made regular references to the Equality Standards for Local Government scheme. Can we conclude that Southwark council has not been effective in disseminating information about the DED or that elements of the duty has not been weaved into the fabric of the organisation. It may be the case that Southwark council is more concerned with meeting the benchmarks of the Equality Standards for Local Government than with complying with its statutory duty to promote equality.

While there is a causal link between the statutory requirement to promote equality and the Equality Standards for local Government, what Southwark council must remember is that, unlike the Equality Standards the duty to promote is legally binding and may have real bite when conflicting organisational priorities attempt to relegate it to the background. While this research provides no direct evidence that lack of knowledge about the legislation on disability

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<sup>681</sup> Southwark council, Findings of the Consultation on supra no. 44 . See also Equality and Human Rights Scheme 2008-11: Executive Summary available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities) (assessed March 2009).

equality amongst the staff of Southwark council is due to lack of publicity, in such cases, it is worth noting that pro-active publicity about the legislation is what is required of the council if the law is to have any real impact in changing organisational culture and ensure the promotion of equality for persons with disabilities.

With regard to the reasons given by the staff of Southwark council for promoting disability equality, it was apparent that the commonest reasons related to the need to ensure good customer service by improving access for all of the council's service users. The desire to follow 'Best practice' was seen as an important factor just as moral, ethical and social reasons were important drivers for many of the council staff. Compliance with the statutory duty to promote equality, or the wish to avoid litigation were rarely cited by the staff interviewed for this study as reasons for promoting equality for persons with disabilities. However, some of the managers, especially in those departments that were directly linked to the council's equality agenda such as the HR and the Social policy and Equalities unit did show that it sometimes played a role alongside other reasons, such as the wish to improve access for all service users.

### **2.1.3 Ensuring Sustainability.**

Like discrimination, disability is a dynamic concept which is constantly being created, defined and recreated by the social environment.<sup>682</sup> This may signify that, for a disability training to be effective in delivering equality it must not only be on-going but its content kept continually under review.<sup>683</sup> Two aspects of the Southwark council's equality training has been plugged to this substantive equality framework; first, the disability competence training has been reinforced by an on-line equality course which is intended to ensure that staff training is continuous. However, undergoing the on-line training course is not mandatory and, judging by the low level of disability awareness amongst the staff as revealed by the interviews conducted for this study, it is likely that take up of the course by the staff is very low. Also, it did not appear to this research that the existence and importance of the on-line

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<sup>682</sup> T. Shakespeare, 'What is a Disabled Person?' in M. Jones and L. A. Basser Marks(eds) *Disability, Diversity and Legal Change*(Kluwer Publishing, Hague 1999)pp 25-34.

<sup>683</sup> DRC, *Disability Discrimination Act 1995 Code of Practice: Rights of Access-Goods, Facilities, Services and Premises* (London Stationary Office, 1999) Para 4.19 and Para 6.22.

course has been given sufficient publicity by the HR department and the department of corporate organisation. Second, the development of an in-house disability equality awareness training championed by disabled staff themselves may guarantee that the training is fed continually by the experiences of the disabled staff themselves.

#### **2.1.4 The ‘Borough Tour’ Project**

This study was informed that Southwark council has reviewed its equality training at induction and has included to its remit a tour of the borough by all new staff. The Borough Tour project involves new staff being given a tour of the borough by coach. Participants are made to visit certain strategic areas in the borough which could advance their understanding of the different equality and diversity challenges encountered by the council. Up to five existing employees of the council are allowed to participate in the Borough tour and to share their experience on equality and diversity with the new recruits, thereby promoting harmony in the working environment. The most recent tour was in March 2010 and included a visit to the offices of Community Action Southwark (CAS).

The Borough Tour project could promote community cohesion and organisational learning both within and outside the public authority through an interaction between the staff and the wider social environment. An underlining assumption of the Borough Tour project is its ability to eliminate prejudice and stereotypes. Disability awareness through training will not only enable the staff of the council to interact more effectively with persons with a disability but will also enable persons with a disability themselves to maximize the benefits of services and auxiliary aids.<sup>684</sup> The positive duties is an approach which broadens the goal of equality, from tackling *one* cause of inequality, discrimination, to the promotion of equality – tackling whichever barriers are standing in the way. The Borough Tour Project is an opportunity for training offered by an employer and therefore it has the potential of being discriminatory under the Equality Act 2010. It will also constitute a PCP under s.20(3) of the Act and thus trigger the duty to make reasonable adjustment by the council in order to accommodate the needs and particular circumstances of any staff with a disability involved in the tour.

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<sup>684</sup> DRC, Disability Discrimination Act 1995, Goods, Facilities, Services and Premises Code of Practice, paras 6.12 and 6.18.

## **2.2 Service-level Consultation and Service Delivery**

### **2.2.1 Improving Services through Consultation**

Consultation with stakeholders, including persons with a disability is embedded in the governance framework of Southwark council. The council has developed a corporate User Involvement protocol and detailed policy guidelines which are expected to be followed at all times by the staff of the council in the conduct of consultations.<sup>685</sup> The council's *Consulting with Diverse and Excluded Communities* enunciates certain core principles which have the potentials of anchoring the consultation exercise to the twin pillars of substantive equality and human rights.<sup>686</sup>

First, the guidance or protocol emphasises that consultation is not just a mere exercise of formality but a process of engagement with the community which must be inclusive to be effective in bringing about any real change. Second, the conduct of consultations is strongly underpinned by notions of equality of access, non-discrimination, equality of opportunity and accessibility which are central to the anti-discrimination ideal. Third, the guidance adopts a proactive approach to consultation, recognising that substantive equality may in certain instances demand that the council adopts positive measures to be able to engage with marginalised groups in the community. Finally, the policy is framed within the context of community cohesion.

### **2.2.2 Consultation as Substantive Equality**

In the context of disability, consultation is not only a human rights issue<sup>687</sup> but is also a legal requirement which may in certain circumstances undermine the validity and legitimacy of a policy if it is not complied with.<sup>688</sup> The normative validity of a policy depends on the process

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<sup>685</sup> DRC, 'The Duty to Promote Disability Equality: Statutory Code of Practice' England & Wales. Para 3.22. See also 'Improving the Life Chances of Disabled People', Prime Minister's Strategy Unit, 2005 HMSO.

<sup>686</sup> Southwark Equality Scheme 2005, Annex 5 'Consulting with Diverse and Excluded Communities.'

<sup>687</sup> See Preamble (o), United Nations Convention on the Rights of Persons with Disabilities (CRPD) available at <http://www.un.org/disabilities/default>. See also, Article 4(3), CRPD

<sup>688</sup> Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005. SI2005/2966 Reg2 (3) (a). See also *Kaur & Shah v London Borough of Ealing* [2008] EWHC 2062.

of its formulation as on its intrinsic validity.<sup>689</sup> Southwark council appears to operate a dual system of consultation which was referred to by a staff of the council as (low) and (high) levels. The high level consultations such as that carried out to inform the DES and the council's Equality and Human Rights Scheme involves an amalgam of directors, senior managers and all the staff of the council, from the chief executive down to the lowest staff. The high level consultations provide an avenue for the council's top management to discover first hand the experiences of marginalised groups in the borough, including persons with disabilities. The low level consultations refer to the routine consultations conducted by staff of the council at departmental levels aimed at obtaining data to inform the formulation of policy and to improve service performance generally. What the both types of consultations have in common is the trust that is built between the council and the disabled residents through transparency and accountability.<sup>690</sup>

### **2.2.3 The Blue Badge Episode**

In 2007, Southwark council carried out an elaborate consultation involving workshops, focus group conferences and unstructured interviews with the residents with disabilities regarding the issue and use of Freedom Passes and the blue badges for persons with disabilities and the elderly. Certain lessons emerged from the episode which could inform the promotion of equality for persons with a disability. First, the different methods employed in the conduct of the consultations enabled the council to capture the views and experiences of the residents with disabilities on the issue. Second, there was a direct correlation between the consultation and the subsequent change of the council's policy on the award of the Freedom Passes and Blue badges. It may be the case that consultation exercises provide opportunities to galvanise persons with disabilities in the borough to become agents of change and to act in concert to bring about important changes to their socio-economic situation. By consulting with service users in improving their services, providers can learn to change the service, prioritize, evaluate their performance and improve their image.<sup>691</sup> Third, the Blue Badge episode establish that, In certain instance, the effects of a consultation may go beyond just the

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<sup>689</sup> J. Habermas, *Between Facts and Norms* supra no. 490 pp1-41.

<sup>690</sup> Southwark council Equality Scheme 2005, Annex 5', supra no. 52.

<sup>691</sup> R. Collier, 'Equality in Managing Service Delivery (Open University Press Buckingham • Philadelphia.

improvements in service delivery to bring about profound constitutional changes in the governance framework of a public authority. A direct consequence of the Blue Badge consultation was the appointment of a representative of persons with disabilities from the Southwark Disability Forum as a member of the council's scrutiny committee.<sup>692</sup>

### **3. Using Procurement to Promote Equality in Service Delivery**

The use of public procurement to achieve other social goals such as equality amongst the different groups in the community has not been without its own controversy. The Equalities Review did not only advocate that a specific requirement on public authorities to use procurement as a tool for achieving greater equality be included in the Public Sector Equality Duty but also identified procurement as step eight in its 'ten steps to greater equality'.<sup>693</sup> On its part, the Discrimination Law Review<sup>694</sup> rejected the idea of a mandatory duty to use procurement to promote equality, arguing that since procurement is but one of a public authority's many functions, having specific duties relating to procurement risks confusing authorities as to the weight they should give to procurement when compared to their other functions.

#### **3.1 Procurement and the Concept of Equality**

##### **3.1.1 Procurement and the Duty to Promote Equality**

This study explored how Southwark council is or is not using its procurement functions to promote the rights of persons with disabilities to non-discrimination and equality. There are 3 main ways by which Southwark council can achieve equality linkage; first, Southwark council can use its position as a major purchaser of goods and services from the market to oblige contractors doing business with the council to promote equality in their various organisations. Second, the council could outsource or commission by way of service contracts some of its

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<sup>692</sup> Southwark council Freedom Pass Review: Executive Response (4) v2(1997).

<sup>693</sup> *Fairness and Freedom: The Final Report of the Equalities Review* (Communities and Local Government Publications 2007) available at [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk).

<sup>694</sup> Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain - A consultation paper Department of Communities and Local Government (June 2007) p.106.

discretionary and statutory services to a private or voluntary organisation and then oblige the relevant organisation to adopt equality policies that reflect or promote the councils equality agenda. According to S150 (5) of the Equality Act 2010, A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998. The question whether a person who is not a public authority but who is carrying out a public function is covered by the general duty is now settled. According to s149 (2), such a person will be covered by the general duty in the exercise of those functions.

Third, the council can use its grants award policy to influence the equality policies of voluntary and community organisations in the borough.

### **3.1.2 The Concept of Compulsory Competitive Tendering (CCT) and the Requirement of Best Value.**

The concepts of CCT and Best value have, at various times, contributed in defining the ability of local authorities to link equality considerations to their procurement policies. Their aim is to ensure that the authorities obtain quality supplies, works or services at a reasonable price and did not expressly include equality issues. Compulsory Competitive Tendering was developed within the framework of the decision by local authorities whether to buy from an 'in-house' team or by contracting out to another organisation. CCT was replaced with a general framework of governance which places on local authorities a legal duty to secure 'Best Value'.<sup>695</sup> Best value requires local authorities to secure continuous improvement in the way in which its functions are exercised having regard to a combination of economy, efficiency and effectiveness'."

### **3.1.3 Procurement and EEC Legislation**

The legislative framework for the award by public authorities of major contracts has been specifically adopted within Europe to promote cross border competition. Two principal directives are of paramount importance in this context; the Public Sector (Directive 2004/18/EC) which applies to central and local Government and other public bodies and

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<sup>695</sup> Local Government Act 1999 Section 3(1).



the utilities (Directive 2004/17/EC) covering certain operations in the water, energy and transport sectors. Underpinning these directives are important principles which are relevant to ensuring fair and competitive public procurement. The principles are transparency, objectivity and proportionality, fairness and equal treatment.<sup>696</sup>

### **3.1.4 The UK Legislative Framework**

The European directives have been given domestic effect in Britain through various regulations, the most significant ones being the Public Contracts Regulations (PCR) 2006 and the Utilities Contracts Regulations (UCR) 2006. The PCR 2006 applies to both central and local authorities and is of direct interest to this study. It covers various types of listed contracts where the value of the contract exceeds the relevant financial thresholds.<sup>697</sup> The financial threshold has been rationalised on the basis that the cost of formal tendering processes can only be justified with large projects. In addition the thresholds are set to capture those contracts that are of sufficient size that they will potentially attract cross-border competitive bids. Contracts awarded under the PCR 2006 must use one of four procedures: open procedure,<sup>698</sup> restricted procedure,<sup>699</sup> negotiated procedure<sup>700</sup> and the competitive dialogue procedure.<sup>701</sup> A common element in these procedures is the requirement that the public authority must publish a contract notice in the Official Journal of the European Union (OJEU) where the contract amount exceeds the relevant threshold.

The Office for Government Contract (OGC) has produced guidance on the way in

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<sup>696</sup> See generally the Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP). (Commission of the European Communities: Brussels, 05.02.2008 C(2007)6661). P.3.available at

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/ppp/comm\\_2007\\_6661\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/comm_2007_6661_en.pdf) Also, Commission v The Republic of Finland Case no. C-195/04 Advocate General's Opinion.

<sup>697</sup> Reg 8, Public Contracts regulations 2006.(PCR 2006), SI 2006/5.

<sup>698</sup> PCR 2006 Reg 15.

<sup>699</sup> PCR 2006 Reg 16.

<sup>700</sup> PCR 2006 Reg 17.

<sup>701</sup> PCR 2006 Reg 18.

which social issues, including equality can be incorporated into public procurement.<sup>702</sup> This is in part based upon an Interpretative Communication from the European Commission.<sup>703</sup> According to the guidelines, public bodies may integrate certain social issues in to their public procurements within the broad framework of the concept of 'sustainable development' covering social, economic and environmental issues. Race, disability and gender are some of the social issues that can be taken into account when the public sector buys goods, works and services. The guidance acknowledges that social issues can have implications in the shorter, medium and longer terms on sustainable procurement and thus, those issues should be approached from a 'whole-life cost' perspective. The guidelines also provide certain factors or conditions which must be taken into account when a public body seek to incorporate social issues.<sup>704</sup> These factors include amongst others the relevancy to the contract and consistency with the government's policy on procurement which is that all public procurement of goods, works and services is to be based at the *award* stage (the point of awarding the contract) on *value for money*, having due regard to propriety and regularity, where value for money means the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user's requirement.<sup>21</sup> Furthermore, actions must be consistent with European and domestic legislation.

## **3.2 The Operational Framework of Equality- Linkage in the London Borough of Southwark**

### **3.2.1 The Southwark Procurement Strategy 2003**

The London Borough of Southwark has a corporate Procurement Strategy which is incorporated in to the council's corporate governance framework and contains certain principles and guidelines linking equality objectives to its procurement activities. However, an important data that emerged from this study is the fact that most of the policy documents and practice guidelines on procurement and equality existing in the council at the time of this

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<sup>702</sup> Office of Government Commerce, Social Issues in Purchasing (OGC February 2006). Available at [http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Purchasing.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf)

<sup>703</sup> <sup>703</sup> Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement (2001/C 333/27).available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:333:0027:0041:EN:PDF>.

<sup>704</sup> Office of Government Commerce supra no.695.

research were developed before the DED came in to force and thus refer to racial equality and not to disability. However, the staff of the council were insistent that the policies and guidelines were equally applicable to disability as to the other equality strands.

### **3.2.2 The Corporate Structures for Procurement Management**

There are two levels of bureaucratic structures within the council regarding the development and implementation of the council's procurement policy. First, there is the Corporate Procurement department that has overall responsibility for developing the council's procurement policies within the context of the law. Second, there is the departmental level where the policies developed by the corporate procurement unit are operationalised. Most of the contracts for the delivery of services by the council are awarded at the departmental levels by the various managers. This gives the managers some leeway to integrate equality considerations in the procurement process. In this respect, this study found out that not only has most of the managers undergone training on equality awareness but that they have also undergone specialised trainings on equality and procurement. The environment services is the largest department of the council and oversee the award of contracts worth over 500million pounds yearly. At the time of writing, there was no evidence that a disability equality impact assessment of the councils procurement policy had been carried out as required by the specific duty regulation and it was not clear to some of the council staff whether such an assessment would have to be carried out by the corporate procurement unit or by each department manager. This conundrum may reflect a failure of Southwark council to develop a joint up approach involving inter-departmental collaboration on equality linkage and this may operate as a serious obstacle to the ability of the council to promote the rights of persons with disabilities in the area of procurement.

### **3.2.3 The Council's Equality and Diversity Statement**

The commitment of Southwark council to use procurement as a leverage to advance its vision to embed equality of opportunity in to its governance framework is encapsulated in section 14 of the corporate Procurement strategy which states that equality of opportunity is not only fundamental to the council's vision for the borough but that the council was committed to use procurement as a mechanism to promote that vision within the context of its Corporate

Equalities Action Plan.<sup>705</sup> This position is further reinforced by the preamble of the councils Ethnic Monitoring Form which states that Southwark Council aims to appoint suppliers and contractors who are committed to promoting equality of opportunity in their organisations and who can demonstrate an ability to assist the Council in achieving its own aims in this area by broadening the diversity of its supplier base. However, It was apparent to this research that it is the ethical considerations, expressed in terms of “best practice” which appeared to be the main driver in the implementation of Procurement Linkage by Southwark council, even though most of the managers did consider that there was a relationship between the procurement policies of the council and the council’s obligations under the public sector equality duty.

The councils Equality and Diversity policy is a powerful statement on the values of the organisation.<sup>706</sup> They are partly symbolic, constituting an unequivocal declaration of the council’s values intended to make it clear to anyone intending to do business with it what the council expects with regard to equality standards. It is significant that the Equality and Diversity Statement is incorporated in to and forms a part of the contract specifications which would normally make clear what information the council expects bidders to supply in evidence of their ability to meet those standards as well as the criteria the authority will use to evaluate it.

### **3.3 Procurement Management as Substantive Equality**

#### **3.3.1 The Prequalification Questionnaire (Pqq)**

The Pre Qualification Questionnaire is an important document in the corpus of documents involved in the procurement process by Southwark council. The PQQ is generally sent out to all potential bidders who respond to the authority’s notice and its purpose is to gather basic information that will allow the authority to conduct a preliminary screening process to reject interested bidders who fail to meet minimum standards of technical or professional ability required by the authority. This research was informed by a manager in the corporate

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<sup>705</sup> The Southwark Procurement Strategy 2003.

<sup>706</sup> Southwark Council Equality and Diversity Policy 2009 available at [http://www.southwark.gov.uk/info/200041/equality\\_and\\_diversity](http://www.southwark.gov.uk/info/200041/equality_and_diversity).

department of the council that the pqq is tailored to each specific contract. This is an important practice of Southwark council as it ensures that equality-related questions aimed at establishing technical or professional ability will be relevant and tailored to each specific contract.

The PQQ provides an authority with an opportunity to link equality considerations in to its procurement process by screening out contractors who do not meet the authority's minimum standards on equality or who have been guilty of breaching the equality or non-discrimination enactments or equivalent provisions in other EU Member States.<sup>707</sup> McCrudden has pointed out that the essence of the Tender Qualifying model encapsulated in the PQQ, is to use public procurement as an additional penalty to the other penalties to which the offending contractor may be subject. In this model, the practice is for the tender to specify that a contractor will be disqualified from tendering for the contract if they have been found to have failed to comply with anti-discrimination or equality requirements.<sup>708</sup> However, the council's attitude towards equality linkage will depend on the degree of relevance of equality issues to the nature of the particular contract that is being awarded. Thus, the council is most likely to disqualify a contractor who fails to respect equality standards where the contract is for the supply of care services to the elderly or to persons with disabilities as such a contract would have a strong equality component. In other words, the council may be taken to apply the principle of proportionality in determining the relevancy of equality linkage to its procurement policy.

This research studied some of PQQ used by Southwark council in its procurement process and it was evident that the questions put to the bidder about its supply chain were detailed and robust enough to reveal circumstances in which the bidder may have committed an act of grave misconduct in the course of its business. Part c of the PQQ contains a detail list of questions on a potential bidder's equality history and current policies and practices on equality which are intended to provide the council with sufficient information upon which to decide whether or not the company is one which the council could do business with. The

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<sup>707</sup> H. Hill and R. Kenyon, *Promoting Equality and Diversity*: supra no.118 pp125-152.

<sup>708</sup> C. McCrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change* (Oxford, OUP 2007) pp 1-25.

contractor is expected to respond to the questions at the time of submitting the tender. And this will be taken in to account when deciding whether or not to award the contract. The questionnaire contains matters relating to disability equality, demonstrating the willingness of Southwark council to link disability equality to its procurement policy.

### **3.3.2 The Preparation of the Gateway Reports**

The preparation of the Gateway Reports is an important bureaucratic mechanism through which Southwark council could incorporate equality issues in to its procurement process. There are three reporting stages for non-emergency procurements:<sup>709</sup>

- Gateway 1 report – to obtain approval of procurement strategy
- Gateway 2 report – to obtain approval to award contract
- Gateway 3 report – to obtain approval to vary contract during its term in terms of length, cost or scope.<sup>710</sup>

This research was informed that officers of Southwark council often use the preparation of the gateway reports as an opportunity to work cooperatively with contractors to promote the council's equality agenda on a voluntary basis. The reports therefore afford the council scope to cajole contractors into developing some sort of corporate social responsibility programmes outside the terms of a contract, particularly in the run up to a re-tender.

However, it is possible within the procurement legal framework for Southwark council to include equality obligations on any contractor doing business with the council. For any such equality obligations to be in compliance with EU law, the council must satisfy itself that the

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<sup>709</sup> Southwark Council, Contract Standing Order 2009-10.

<sup>710</sup> Southwark Council, Contract Standing Order 2009-10 para 4.7 require that a report be submitted to the relevant departmental contract review board for information and if the decision is valued at £100,000 or more also to the audit and governance committee. The report is expected to set out the circumstances and manner in which the decision was taken.

following conditions are met; first, the equality obligations must not discriminate directly or indirectly on grounds of nationality. Second, the obligations must have been disclosed to bidders in advance with the tender documentation. Third, any such equality obligations imposed must not lead to market flight. In other words, they must not operate as a disincentive to interested bidders, particularly SMEs bidding or add unnecessarily to the cost which may dissuade potential bidders. Fourth, the equality conditions should not only be relevant to the contract but must also bring about a proportionate benefit in terms of achieving value for money for the taxpayer.<sup>711</sup>

### **3.3.3 Project management and Equality Monitoring**

In addition to the PQQ, Southwark council has an ethnic monitoring form which constitutes part of the corpus of documents involved in the procurement process. The Ethnicity Monitoring Form was established under the statutory duty to promote race equality as a means to assist the council to monitor the number of minority-led/diverse enterprises which were doing business with the council. Minority-led/diverse enterprise is defined as a business which has a majority (51% and more) ownership or senior management team comprising individuals from any of the equality groups, including persons with a disability.

This study was informed that one of the most important weaknesses of the council's strategy on procurement and equality is the absence of any system or mechanism for effective equality monitoring which makes it difficult to establish whether the strategy is having any effect in terms of making contractors to adopt equality policies and practices. This weakness is reflected in the council's Ethnic Monitoring form which contains no provisions for monitoring the work force composition of contractors other than requiring them to state the composition of their employees. Furthermore, in most of the cases, the ethnic monitoring form is never returned to the council together with the PQQ as stipulated and that there is no known case where a contractor has been disqualified from bidding for a contract on the basis that they failed to comply to the requirement to provide information on their equality policy. However, the council will not hesitate to withdraw from or terminate the contract of a contractor that is pursuing discriminatory policies or is openly flaunting the council's equality standards.

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<sup>711</sup> Office of Government Commerce supra no.695.

The council's 'Procurement by Public Authorities-Criteria Checklist' provides a graduated approach to assessing the policies of contractors with regard to equality. A distinction is made between contractors with less than 5 employees and those with 5 and more employees, with the latter being required to have a more robust and comprehensive policies and systems on promoting equality and tackling discrimination in terms of advertisement, recruitment, workplace harassment, appraisals and promotions and equality monitoring than the former.<sup>712</sup> In both categories of contractors, the council requires written statements from the contractors on their commitment to non-discriminatory policies that advance rather than undermines the council's equality agenda. The Criteria Checklist and the Ethnic Monitoring Forms are employed for internal use only by the council's staff. The distinction between the small and big employer in relation to Southwark procurement appears to have been justified on the grounds that it will be burdensome and unfair to impose on a small employer the same degree of responsibility on equality as on the big employer who is more likely to have the resources to discharge such a responsibility. This distinction is baseless with regard to disability equality where the benchmark should be the degree of relevancy of an employers business to disability and not whether the costs of eliminating disability discrimination are burdensome or not. In any case, there is a need for Southwark council to follow the example of the DDA 1995 with regards to the duty to make reasonable adjustment and abolish the difference.<sup>713</sup>

This research was informed that the councils new procurement strategy encompassing all the equality grounds and which is now being developed will contain a more robust monitoring mechanism. A new Equality Monitoring Form will be introduced to replace the Ethnic Monitoring Form and will be used to monitor the policies and practices of contractors doing business with the council. Such a development with regards to procurement linkage in Southwark council will be very important to the promotion of equality for persons with disabilities especially when it is recognised that much of the inequality suffered by this group of person's results from structural inequality in the economy.

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<sup>712</sup> The OGC uses the expression 'small and medium size enterprise' (SME) to refer to a business with less than 250 employees. See generally Social Issues in Purchasing. Ibid.

<sup>713</sup> Prior to 2004 there was an exemption for small employers, employing fewer than 15 employees. This has now been removed. See generally the Disability Discrimination Act 1995 (Amendment) Regulations 2003 Regulation 7. The Equality Act 2010 does not make any distinction between small or large enterprises.



### **3.4 Outsourcing**

Section 8 of the Southwark Procurement policy commits the council to a policy of outsourcing as a part of its procurement policy. According to the section, the Council has a mixed economy of service provision. In addition to the commercial sector, a substantial number of services are provided by the not-for-profit and voluntary sector. The Council endorses the view that the highest standards of service provision are more likely to be achieved where there is a genuine competition, choice for service users and a mixed economy, rather than where any one supplier (in-house or otherwise) dominates the provision of services.<sup>714</sup> In this context, outsourcing occurs when Southwark council passes over to a private or voluntary organisation work that has previously been done in-house.

#### **3.4.1 Private sector outsourcing**

Southwark council awards contracts worth over 2.5 billion pounds yearly, most of which are awarded to the private sector. The company Vantage has been commissioned to run the councils One-stop Shops while Vantage is commissioned to administer the award of the Freedom Passes and Blue Batches on behalf of the council. This research was informed that, apart from these companies having submitted a PPQ which was assessed and approved as meeting the council's equality standards, the contracts with each of the companies contain an equality clause which commits the companies to promote equality after the award of the contract. McCrudden has pointed out that, when combined with the Criteria model as in the cases of Vantage and Vantage, the Pre-qualification model provides the most effective approach to procurement linkage.

The One-stop shops or Customer Service Centres (CSC) first became operational in May 31 2005 and the project is an important area where the delivery of major statutory services has been outsourced to the private sector by Southwark council. The shops deliver advice and assistance to the residents of the borough in areas such as council tax, Housing benefits, income support etc. This study found that there has not been any equality impact assessments and monitoring of the shops since their creation in 2005 to establish how they are delivering on equality. This is so despite of the fact that the contract with Vantage has been renewed in

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<sup>714</sup> The Southwark Procurement Strategy 2003.

2010 under the council's roll-over process. This may be due to the fact that, unlike the councils Community supports services which have developed an equality monitoring framework for the voluntary sector, the corporate procurement department does not have a similar policy for monitoring the equality performance of contractors who do business with the council. Another difficulty appeared to lie in the difficulty of carrying out cross cutting impact assessments involving different departments of the council. This study was informed that if there were to be any equality assessment of the one-stop shops, it would have to be coordinated by the department in charge of customer's services and involving other departments of the council. It may be the case that the council does not find the logistical and financial costs of carrying out such a cross-departmental assessments as achieving proportionate benefit to the goal of ensuring strict compliance to the council's equality policy or standards. This may justify the perception that policy makers are often willing to sacrifice equality in the face of financial considerations and that it may be necessary at times for the law to abandon the carrot for the stick if organisations are to give equality the importance it deserves in their activities.

The Southwark Procurement Strategy contains in sections 16 and 17 a clear commitment by the council to promote SMEs owned and managed by persons from marginalised communities, including persons with disabilities. Though this study was not able to obtain any evidence of any business venture owned by a person or persons with disabilities that have been supported by the council through its procurement policy, what is clear is the fact that where persons with disabilities are able to own and prosper in their own business through the support of the councils procurement policy, this could impact positively on their economic position and thus increase their independence, autonomy and sense of dignity and self worth.

### **3.4.2 Outsourcing to the Voluntary and Community Sector (VCS).**

#### **See community grants EQIAS paper in short new u disc**

The VCS is an important sector of the community not only in terms of its membership and the number of persons it employs but also in terms of the services it provides to the community. In this respect, the VCS is not only an important instrument in the promotion of equality in the community but is also an important partner to local authorities in the delivery of services and the promotion of equality. The use of public funds by Southwark council to promote its equality agenda is not limited only to the procurement of goods and services but also includes the provision of grants and other financial assistance made to the voluntary sector.

Though the focus of the study was not on the VCS, there was evidence that Southwark council has on occasions outsourced the delivery of some of its discretionary and statutory services to the voluntary sector. However, this study was informed that, where there is such an outsourcing to the VCS, it is often done through the Community Support Services and not through the corporate procurement, thereby not subject to the PQQ. The council, through the community support services has developed an equality monitoring and assessment framework which is integrated in to its Prospective Participatory Budgeting scheme and enables the council to link the promotion of equality to the activities of the VCSs.

The policy of Southwark council to outsource some of its discretionary and statutory services to the VCSs could prove to be an important mechanism for the promotion of the rights of persons with disabilities as voluntary organisations representing their interests could benefit financially from it. The council has outsourced the delivery of advice services on Personalised Budgeting under the governments Independent Living program to the Organisation for Blind Africans and Caribbeans (OBAC). The Organisations director has confirmed that the contract has not only strengthened the financial position of the organisation but has also enabled it to offer employment to some visually impaired resident , thereby reducing the level of unemployment amongst this group of disabled persons in the community. A financially stable organisation for persons with disabilities is crucial for

mobilising and galvanising its members to participate in the decision making processes of the local authority.

## **CHAPTER EIGHT: Conclusion and Recommendations**

### **Introduction**

- The conclusions to this study have been focused on the following areas;
- the inadequacies of the framing of the duty
- the limitations on the concept of participation
- the need to promote public awareness on disability
- the Relationship of the statutory duty to promote disability equality to the concept of indirect discrimination and the duty to make reasonable adjustment
- the future development of the duty

### **1.0 The inadequacies of the Framing of the Duty**

#### **1.1 The Requirement to Eliminate discrimination**

A recent research by the Commission for Equality and Human Rights concluded that public authorities in the UK are failing to tackle the problem of discrimination against persons with disabilities. And that more action is needed in this area.<sup>715</sup> This study found that, within the context of disability, there are important issues relating to the requirement under the public sector equality duty to eliminate discrimination. First, There is an important truth which has wider implications on the framing of the duty and which runs through this study. This truth refers to a deep-rooted tendency on the part of both public bodies and private organizations in the United Kingdom to take defensive steps to meet their obligations under anti-discrimination laws. This has been referred to in this thesis as the (culture of negative compliance.) A linked effect of this is that practices which would ordinarily amount to institutional discrimination are considered by public authorities as acceptable in so far as they are outside the legally established definition of discrimination. This has meant that certain deeply entrenched practices both inside and outside the local authority which are discriminatory in the context of disability have benefitted from what Occineide refers to as the ‘cloak of acceptability.’<sup>716</sup> There is

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<sup>715</sup> Equality and Human Rights Commission: ‘Our Inquiry into the Harassment of Disabled People’ (2011) available at [http://www.equalityhumanrights.com/uploaded\\_files/disabilityfi/dhfi\\_easy\\_read.pdf](http://www.equalityhumanrights.com/uploaded_files/disabilityfi/dhfi_easy_read.pdf).

<sup>716</sup> C. O’Cinneide, ‘A New Generation of Equality Legislation? Supra no. 2 pp 219-248.

evidence in this study to conclude that this culture potentially may sit uncomfortably with the proactive approach to equality encapsulated in the public sector equality duty. This has been identified in this thesis as the conflict between the culture of negative compliance and a proactive approach to equality.

Second, Fredman and Spencer have pointed out that the formulation of the public sector duty on equality in terms of due regard is weak as it (merely requires a body to consider the need to eliminate discrimination, not take any action.).<sup>717</sup> While the lessons of 'modern' regulatory theory may indicate that the effectiveness of equality strategies depend not so much on conventional 'command and control but more on convincing those who implement the strategy of its appropriateness and value, this study conclude that, Given its permissive rather than mandatory nature, it will be difficult for the public sector equality duty to oblige organizations to discard easily the entrenched culture of negative compliance for a proactive approach without some element of coercion. In other words, if the duty is to be able to bring about enduring social change by obliging organizations to discard the culture of negative compliance and adopt a proactive approach to promoting equality and non-discrimination, then a more mandatory rather than permissive duty is required. In fact, it does not make sense to require public authorities to do no more than pay due regard to the need to eliminate discrimination just as it will be incorrect to assume that simply requiring organizations to pay due regard will push them to take the necessary actions to promote equality. A law which contains a much stronger formulation would signal an unequivocal endorsement of the principle of non-discrimination as well as provide clear guidelines for compliance.

## **1.2 The Requirement to Mainstream**

The scope of the due regard requirement is intimately related to the content of the duty itself. Under the current public sector equality duty, the traditional negative duty not to discriminate is now combined with the two positive duties, namely, to promote equality of opportunity and

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<sup>717</sup> S Fredman and S Spencer, 'Equality: Towards and Outcome Focused Positive Duty' *supra* no. 102 pp. 14 – 19.

to promote good relations between persons in the community. This is essentially a mainstreaming measure. This study has explored the operationalisation of the concept of mainstreaming in the context of the London Borough of Southwark and asserts that, while the concept theoretically may have important advantages in terms of promoting equality for persons with disabilities, there are certain practical difficulties which may undermine its effectiveness as a strategy to achieve the ideals of equality and non-discrimination.

First, the strategy is highly dependent on the political will of the local authority and this has been identified as a major weakness of the proactive model.<sup>718</sup> In other words, the development and effective implementation of mainstreaming strategies is likely to occur only when the local authority is able to demonstrate effective and sustained political leadership and the necessary organisational capacity to ensure long-term sustainability of positive measures designed to promote the rights of persons with disabilities. One way by which the London Borough of Southwark has attempted to reduce the level of political discretion in the operationalisation of its strategies on mainstreaming and to ensure that its implementation is firmly centred on fundamental rights rather than political discretion is by incorporating human rights values into its corporate policies and strategies. For example, the council's Equality and Human Rights Scheme 2008-2011 is firmly rooted in equality and human rights values and provides the corporate framework for the conduct of equality impact assessments by the council. This convergence between human rights and the ideals of non-discrimination and equality in the context of the implementation of the public sector equality duty does not only resonate positively with the government's 'modernisation agenda' of the public service encapsulated in the 'human rights culture'.<sup>719</sup> But also amounts to recognition of the common humanity and equal dignity of persons with disabilities.

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<sup>718</sup> S. Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space" *supra* no. 43 pp41-60.

<sup>719</sup> F. Butler, 'Building a Human Rights Culture', *supra* no. 185 pp63-80; see also 'A Guide to the Human Rights Act 1998' (Department for Constitutional Affairs Third Edition October 2006) available at [www.dca.gov.uk](http://www.dca.gov.uk).

Second, the legislation requires public authorities to mainstream equality considerations in to their policies and functions but does not say how this is to be achieved. This lack of clarity of the legislation may result in its implementation being a mere tick-box exercise, confirming the conclusion of Professor Fredman that ‘proactive models frequently confuse the strategy with the aims, so that tools, such as monitoring and ...impact assessments, are treated as if they were ends in themselves rather than means to achieve an end....’.<sup>720</sup> In order to assist authorities with the Tactical implementation of the public sector duty on equality, the Discrimination Law Review recommended that they should be provided with a clear statement of its purposes.<sup>721</sup> In its response to the proposal, the Government indicated that the clarity of the legislation would be achieved, not by the inclusion of a purpose clause, but by ensuring that the statute explains what is meant by ‘advancing equality of opportunity’ for purposes of the duty and by ensuring that detailed guidance was made available to public bodies through statutory codes of practice.

In spite of the government’s claim, this study found that the boundaries of the concept of mainstreaming remain unclear especially in the context of disability and this appeared to be a major source of difficulty for some of the staff of the council attempting to implement the duty. Mainstreaming disability equality does not only require a careful exploration of the interests, needs and experiences of persons with disabilities but also an analysis of the boundaries between sameness and difference with regard to the different equality groups in order to identify what is to be mainstreamed. In other words, the operationalisation of the concept of mainstreaming is both a theoretical and practical challenge to public authorities in that they are not only required to address an increasing number of equality groups but are also required to engage with equality and human rights.

Furthermore, mainstreaming through the conduct of equality impact assessments remain largely a bureaucratic exercise which necessitate an analysis of how and where equality

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<sup>720</sup> S Fredman, ‘Changing the Norm: Positive Duties in Equal Treatment Legislation’ *supra* no.163 p369.

<sup>721</sup> Department for Communities and Local Government, ‘Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain-A Consultation Paper.’ (London Stationery Office 2007).



considerations intersect with usual organisational processes, policies, practices and structures. This could present operational challenges, especially in the context of local authorities such as the London Borough of Southwark where the organizational co-ordination allows for departmental autonomy. In fact, it was apparent to this research that the different Departmental managers of the council did not only demonstrate varying levels of commitment to the implementation of the equality duty but were at times working independently of each other. This was often manifested in managerial decisions aimed at transforming reactive negative compliance, or ad hoc mainstreaming initiatives, into proactive approaches informed by the perspectives of different disability groups. A consequence of this is the fact that corporate strategies embodying disability equality issues intended to be mainstreamed did not always achieve change on the ground. This study found that, in the context of the London Borough of Southwark, Corporate equality strategies generally originated from the office of the Assistant Chief Executive but most of the departmental staff complained of difficulties in mainstreaming the message and achieving change on the ground. If the aim of mainstreaming is that principles of disability equality are placed at the heart of policy-making processes at all levels of an organisation, then the challenge remained to ensure that there is joined-up workings between the different departments of the council.

## **2. The Requirement of Participation**

In developing a public duty on equality, the government has reformulated traditional notions of rights, moving from what Professor Fredman refers to as an individualised, judicially enforceable, and fault-based form to one that espouses a proactive model which aims at achieving institutional change through the participation of marginalised groups in both the process of decision making and implementation.<sup>722</sup> However, the exact relationship between law and participation is varied. First, where participation in the decision making process is required by law, this operates as a condition of the legality of the decision. Second, this thesis has found that, although Participation is a good theoretical concept addressing the interests of marginalised groups in the community, including persons with disabilities and for ensuring their social integration, its practical implementation in the specific context of disability equality Could be problematic. The potential constraints relating to the lack of a shared

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<sup>722</sup> S. Fredman, *supra* no. 43.

understanding of what participation is all about, identifying the target group, the potential development or growth of an epistemic community and the costs of promoting participation are significant challenges in the legal contexts. The challenge, therefore, is how the concept of participation will be applied in a coherent manner in order to attain substantive equality for the disadvantaged groups in the community, including persons with disabilities.

## **2.1 Defining the Concept of Participation**

This study concludes that there is a need for a shared understanding of what the legislation means by participation in the context of disability. Participation is both a legal and Human Rights value and may mean different things for different organizations. In fact, it was evident to this study that the concept could be operationalised from three distinct but interrelated levels; first, at the community level, participation denotes full and active participation within the community or social inclusion. This is not confined to participation in the workforce but extends to participation in the community, which is particularly important for most persons with disabilities who may not be in any form of paid employment. participation in this context is not only an important means of overcoming marginalisation and social exclusion but has the potential of fostering good relations in the community. Second, participation also connotes inclusion in major social and political institutions such as Scrutiny committees of local authorities and particular decision-making structures in the workplace. Participation in this sense is an essential, but not exclusive aim of the public sector equality duty and may take a variety of forms, ranging from the mere disclosure or publication of relevant equality information to consultation and to co-decision-making. Participation in this context may provide the regulatory framework for accountability and transparency and the development of trust between public bodies and persons with disabilities in the community. Third, at the individual level participation is promoted as part of the autonomy and self-worth of the individual. Autonomy requires participation in those decisions which affect one's life.<sup>723</sup>

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<sup>723</sup> S. Fredman, 'Disability: A Challenge to the Existing Anti-Discrimination Paradigm?' *supra* no.8 pp 219-248.

There was evidence in this study that the London Borough of Southwark has developed initiatives, policies and programmes directed at promoting the participation of persons with disabilities in specific areas, be they at the individual, systemic or societal levels. At the institutional level, however, these programs often reflected particular areas of interest and expertise amongst the staff of the council and the agendas of the particular group of persons with disabilities with whom the authorities engaged. Such an approach may indicate the absence of a coherent vision of participation. A clear definition of participation is not only essential for consistency and clarity in the measurement of progress but may be the glue that binds together the many dimensions of the concept.

## **2.2 Identifying the Target Group**

The implementation of the concept of participation in the context of disability presents certain unique challenges which may undermine the effectiveness of the legislation. One of the challenges relates to the issue of identifying the potential scope of the relevant target group. It could be argued that participation can only be measured if the group can be clearly identified. How can it be said that equality for persons with disabilities is being promoted or that there is lack of participation by persons with disabilities unless those who are disabled can be clearly identified? This naturally requires a definition of disability or who is a disabled person for the purpose of the legislation.

There are two important points which could be linked to the scope of the protectorate. First, the definition of disability in the Equality Act 2010 has the potential to operate so as to weaken the interpretation and enforcement of the duty. In other words, the inclusion of a definition of disability or a disabled person in the Equality Act 2010 may imply that public authorities are not afforded any latitude in how they define disability for the purposes of implementing the equality duty. Section 6 of the Equality Act 2010 specifies a mainly medical definition of disability for the purposes of the Act. The section builds on the medical orientation of the definition of disability under the repealed DDA 1995 which was highly criticized for leaving out of its scope many types of disabilities simply because they do not meet the medical definition of impairment. The definition was broadened in 2005 to include persons suffering from cancer, HIV infection or multiple

sclerosis.<sup>724</sup> Furthermore, the Equality Act 2010 has expanded the scope of the protectorate in the context of direct discrimination to include associative discrimination and discrimination by perception.<sup>725</sup>

Second, there is an apparent conceptual divide between the medical model of disability and the Social model of disability which provides the ethos of the public sector duty to promote equality and this may provide some difficulties to organisations implementing the duty. It is plausible to conclude that The Equality Act 2010 seeks to reconcile the two stools by having a definition which focuses on functional ability but has exemptions and extensions to reflect the broader range of persons experiencing discrimination arising from the presence of impairment. How the public sector duty would work within the Equality Act definition of disability is still unclear and thus requires further research.

However, this study was able to come to two main conclusions based on the empirical evidence. First, a major strength of the approach of Southwark council in implementing the equality duty, and which could be extrapolated to other local authorities, is the fact that the council has adopted an expansive approach by extending the outer limits of the legal definition of disability to include individuals who would not generally qualify as disabled under the Equality Act 2010. This is most evident in the way the council has been able to link disability and age in its service delivery strategies. The rationale of this approach may be grounded on the argument that to limit participation to certain kinds of disability or to disabilities reaching a certain degree would not appear to be consistent with the underlying goals of the public sector equality duty which is to promote substantive equality. A substantive equality approach is more likely to focus attention on the realities of disability discrimination and to take an active attitude to dismantling the obstacles which stand in the way of equality for this group of persons.

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<sup>724</sup> Disability Discrimination Act 2005 (Amendment). See also M. Rubenstein 'Revised Guidance on Disability Definition No. 158 *Equal Opportunity Review* November 2006.

<sup>725</sup> Section 13 Equality Act 2010.

By placing the emphasis on human dignity, respect, and the right to equality and non-discrimination rather than on the impairment of the individual, the substantive equality approach recognizes that the attitudes of society and its members often contribute to the persistent discrimination against persons with disabilities. In other words, for the duty to have any real impact on the promotion of substantive equality for persons with disabilities, local authorities must take a broad view of the nature of disability, both by moving outward from the law and inward from issues of particular concern to persons with disabilities. Disability should be seen as fluid and should not be conceived as narrowly as the legal definition in the Equality Act 2010. In any case, a broad definition of disability will be in tune with the aim of promoting equality. Second, it may be the case that the Equality Act 2010 definition provides a floor and while there is nothing to stop employers or service providers adopting a broad definition of disability and ignoring the current definition of the Equality Act 2010, *there is* The practical concern that extending the outer boundaries of the definition may increase the costs on public authorities of promoting the participation of persons with disabilities.

### **2.3 The Growth of an Epistemic Community**

A Second Debate that emerged from the research and which Shadows the issue of the target group is the question of Who Has a Voice in disability Equality Policies. In other words, the question of who has/should have a voice in the debate to say what is disability equality may be relevant in establishing the boundaries of participation in the context of the group dimension to disability equality. In academic literature the focus has been mostly on the tension between “expertise” and “democracy,” an issue that has become even more evident in the context of the implementation of disability mainstreaming. This debate has a wider implication on how organisations promote the participation of persons with disabilities in the decision making process and represents two fundamental currents in the operationalisation of the concept of participation in the context of disability equality.

On one side stands the idea of disability equality policy as a political process of democratization in which the voices of persons with disabilities are included in the policymaking process. On the other side is the view that equality considerations are a

specialised area of policy formulation better left to professionals and experts. This has been identified in this study as the participatory-deliberative approach and the expert bureaucratic approach to mainstreaming. One way by which Southwark council has attempted to bridge the gap between the two approaches is by combining the bureaucratic and participatory approaches through the operationalisation of the Equality and Diversity Panel.

However, this study was able to establish that there is the existence within the council's equality structures of a pool of activists working together to promote the council's equality agenda and this may potentially undermine the ability of the legislation to deliver substantive equality for persons with disabilities. This pool of activists is constituted mainly of the officials of community organisations who often do not themselves have any disability. While such a development may serve to highlight the strength of the equality duty to galvanise disability organisations to work in concert, the risk here is that this pool of activists may over time crystallized in to what may be referred to as an epistemic community, thus depriving the concept of participation of its broad based appeal.

The requirement of participation is aimed at two main outcomes; first, it provides the framework for a long-term, sustained and informed dialogue between the public body and persons with disabilities in order to identify and meet their needs. Second, it is intended to empower persons with disabilities to become agents of change of their own circumstances. There is a possibility that both of these aims will not be achieved if participation strategies continue to be focused on the epistemic community to the obvious exclusion of the wider disability community. where public bodies do consult persons with disabilities as a way of promoting the participation of this group of persons in the decision making process of the organisation, there is a temptation to focus on the epistemic community, probably because these individuals have demonstrated a deep understanding of the workings of the particular body. Such a tendency could fundamentally undermine the legitimate expectations of the vast majority of persons with disabilities who have limited means of drawing attention to their circumstances in the political arena. A linked effect of this is that policies and programs will be developed based on the views of this epistemic community which may not necessarily be representative of the vast majority of persons with disabilities. This

suggests that, as far as the process of participation is concerned, there are strong potentials for it to become exclusionary rather than inclusive, and thus perpetuate discrimination rather than combat it.

### **3. Raising the Level of Equality Awareness**

This study has demonstrated that the development and implementation of equality awareness training is a key element in the implementation of the duty on public authorities to promote equality and non-discrimination. In the disability context, it is important to situate the relevance of equality training within the context of the varied ways by which persons with disabilities could be discriminated against. Historically, persons with disabilities have been treated negatively in part because of their low status in society which has given rise to a feeling of superiority on the part of public officials and professionals. In the context of the provision of welfare support, the exercise of discretionary powers under the relevant social welfare legislations is characterised by paternalistic decision making and protectionism. In this context staff training on equality may be crucial not only in obliging public officials to discard their paternalistic attitude by valorising the group identity of persons with disabilities but also in promoting two important principles of disability equality; autonomy and self-determination.

An important feature of discrimination against persons with disabilities in the community is the prevalence of inaccurate proxies or stereotypes concerning the assumed characteristics of persons with disabilities and this theme run across this study. Despite the assertion of Professor Quinn that (These proxies are usually highly inaccurate and diminish the individuality of the individual),<sup>726</sup> this study came to the conclusion that, so far, the emphasis has been on staff training as a way of developing organizational capacity to deal with the challenges of mainstreaming. However, if the duty is ultimately to change societal attitudes by promoting the ideals of non-discrimination and equality in the context of disability, there is a Need to extend Disability Awareness Programs to Outside the Organisation.

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<sup>726</sup> G. Quinn, 'Disability Discrimination Law in the European Union' supra no.38 pp231-277.

Public bodies, especially local authorities would have to develop and implement sound and effective public awareness campaigns and strategies on disability discrimination and equality. This clearly seems essential in the light of the recent increases in the level of harassment and violence against persons with disabilities in the community and could lead to more general gains. In addition to encouraging a more proactive approach to tackling disabling barriers by other organisations outside the local authority, such a public awareness campaign would support a general change in discriminatory attitudes amongst the public. The campaign would need to highlight some of the barriers faced by persons with disabilities and the changes to the policies and practices of the local authority would complement this message. There would also need to be a sustained publicity campaign particularly to highlight the difference between discrimination and hate crime in order to make sure that the broader public understood the difference and did not misinterpret it. This shift in public attitudes required by the legislation is one of its positive attractions.

#### **4. The Relationship with the concept of indirect discrimination and the Duty to make reasonable adjustment.**

It is important for assessing the future strength of the equality duty to recognise its relationship to other anti-discrimination provisions such as indirect discrimination and the duty to make reasonable adjustment. This study has highlighted the operationalisation of the twin currents of the duty to make reasonable adjustment- the reactive duty and the anticipatory duty-and has demonstrated that the pace of change that is likely to be generated by the anti-discrimination concepts such as direct" discrimination and reactive reasonable adjustment is likely to be slow. Meanwhile, group-based concepts such as indirect discrimination and anticipatory reasonable adjustment clearly have the potential to accelerate the attainment of substantive equality for persons with disabilities.

##### **4.1 Duty to Make Reasonable Adjustment**

The lynchpin of the anti-discrimination provisions in the disability context is the duty to make reasonable adjustment. In the same vein, a key feature of substantive equality is the development of innovative ideas as a way of promoting access to employment and the provision of services for persons with disabilities. This study conclude that the potential of



the London Borough of Southwark to develop new and innovative ideas to dismantle the social and institutional barriers which persons with disabilities encounter in the provision of services has been powerfully enhanced by the operation of the concept of anticipatory reasonable adjustment. The centrality of the concept as a tool in the struggle for disability equality has been aptly put by Professor Anna Lawson when pointed out that “Indeed, if the 'crowning glory' of the Americans with Disabilities Act 1990 was the concept of reasonable accommodation, the 'crowning glory' of British reasonable adjustment law is undoubtedly this concept of anticipatory reasonable adjustment”.<sup>727</sup>

However, the duty is reactive in the employment context and this may sit uncomfortably with the idea of substantive equality encapsulated in the public sector equality duty. According to Article 5 of the Framework Directive, the object of such accommodation or adjustment is stated to be to 'enable a person to have access to, participate in, or advance in employment or to undergo training'. This means that adjustments are needed not only to ensure that employees with disabilities stay and progress in employment but also that they could access employment. The development of innovative strategies for the employment of persons with disabilities could be enhanced by the extension of the anticipatory reasonable adjustment duty to the field of employment. One area where this could have a positive effect is in the recruitment process. This research has identified the tensions that potentially could be generated by organisational structures that allow for a variation of decision making in the recruitment process and how this could translate in to a tension between the reactive and anticipatory reasonable adjustment duties.

Extending the anticipatory duty to the field of employment will minimise the potential for conflict between the two arms of the duty by reinforcing managerial decisions aimed at translating the corporate objective of building an inclusive workforce into concrete initiatives to promote the employment of persons with disabilities. It will also enable the process of making reasonable adjustment to be converted into an opportunity for debate and innovation within the organisation's recruitment process. In particular, the anticipatory duty would have the practical effect of obliging managers to reflect carefully on

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<sup>727</sup> A. Lawson, *Disability and Equality Law in Britain: supra no 68* pp289-98.

the type of reasonable adjustment that the organisation might be required to engage in within the context of establishing the ability of a person with a disability to perform the essential functions of a job. Professor Quinn has pointed out that, (if the marginal or non-essential functions of a job could be transferred to another employee in order to enable an employee with a disability to perform the 'essential functions' of the job then such 'reasonable accommodation' might be required.)<sup>728</sup>

This study came to the conclusion that an extension of the notion of anticipatory reasonable adjustment to operate along side the reactive duty in the field of employment may be crucial in ensuring the successful realisation of the aims of the public sector equality duty. It emerged during this study that, in the particular context of the London Borough of Southwark, the operationalisation of the notion of reactive reasonable adjustment and the crucial absence of the anticipatory duty was instrumental in the inability of the authorities to develop an effective strategy to increase the number of persons with disabilities employed by the organization. This conclusion is supported by a research conducted on 6 local authorities in the UK which found that most of the authorities did not have strategies to implement the changes needed to increase the number of persons with disabilities employed by their organizations.<sup>729</sup> An underlining reason for this appears to be the absence of the anticipatory reasonable adjustment duty to oblige the authorities to develop innovative ideas and positive action programs aimed at promoting the take up of employment with the authorities by persons with disabilities. The situation in Southwark council may be representative of what may occur when a local authority overwhelmingly pursue an individual, reactive approach to disability equality by concentrating on meeting the needs of existing employees with disabilities rather than working more broadly to remove barriers to employment as implied by the notion of anticipatory reasonable adjustment.

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<sup>728</sup> G. Quinn *supra* no.38.

<sup>729</sup> C. Barnes et al *Able Authorities? The Disability Discrimination Act, disabled people and local authorities in England* (Communities and Local Government July 2006) 06 LGSRU 04027 available at [www.communities.gov.uk/publications/localgovernment/ableauthorities](http://www.communities.gov.uk/publications/localgovernment/ableauthorities)

## **4.2 Indirect Discrimination**

In addition to the duty to make reasonable adjustment, this study has been concerned with the operationalisation of the concept of indirect discrimination. The most significant relationship between the concept of indirect discrimination and the duty to promote equality could be found in their both anticipatory nature which arises from their group disadvantage element. Indirect discrimination' was transposed into the British legislation from the American judicial theory of 'disparate impact. In the context of disability, indirect discrimination involves the unjustified application of an apparently neutral criterion, provision or practice which has a disparate impact on persons with disabilities and which actually disadvantages the claimant. the implication of the prohibition on indirect discrimination is that public bodies must anticipate ways in which their operations might disadvantage persons with disabilities and take reasonable steps to remove or minimize the potential difficulty. In other words, public bodies are under a duty to scrutinize their physical features and apparently neutral provision, criteria and practices in order to identify the disproportionate disadvantage they may cause to persons with disabilities and to anticipate how any potential barriers might be removed, altered or avoided. In this way, the prohibition of indirect discrimination may minimise the effects of the absence of the anticipatory reasonable adjustment in the employment field.

However, the requirement of claimant disadvantage in indirect discrimination could have profound effect on the promotion of equality for persons with disabilities. The claimant disadvantage requirement renders it impossible for indirect discrimination claims to be brought until an individual disadvantage by the particular provision, criteria, policy, procedure, practice or feature is willing to bring a case. The effect here is that a particular practice or procedure which has a disparate impact on persons with disabilities can be challenged only if there is a willing claimant who has suffered a disadvantage. This is the case even where it is obvious that the practice or procedure operates to exclude or disadvantage a significant number of persons with disabilities. It is possible that this limitation in the concept of indirect discrimination may itself prove to be the engine to galvanise persons with disabilities to become agents of change of their socio-economic circumstances.

## 5. Future Development of the Duty

Professor Quinn has described the imposition of the duty to promote equality as a 'striking and positive..... example of an approach to 'positive action' which measurably enhances the success of the underlying anti-discrimination legislation.'<sup>730</sup> However, the conclusion that could be drawn from this study is that its implementation is likely to face a bumpy ride as public authorities adjust from the culture of negative compliance to a proactive approach to equality. The reality is that every bump will not only increase its strength and effectiveness but will profoundly shake the lives of persons with disabilities in Britain. The proposals suggested in this thesis would facilitate its implementation so as to attain substantive equality for persons with disabilities.

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<sup>730</sup> G. Quinn, *supra* no.38.

## BIBLIOGRAPHY

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### Books

- Baker J, Lynch K et al, *Equality From Theory to Action* (Palgrave Macmillan 2004).
- Barnes C and Mercer G (eds), *Implementing the Social Model of Disability: Theory and Research* (Disability Press 2004).
- Clements L and Read J, 'The Dog that didn't Bark: The Issue of Access to Rights Under the European Convention on Human Rights by Disabled People in A. Lawson and C Gooding (eds) *Disability Right in Europe: From Theory to Practice*(Oregon, Hart Publishing 2005). pp.21-34.
- Creswell J, *Qualitative Inquiry & Research Design: choosing among five approaches* (London, Sage Publications 2007).
- Collier R, 'Equality in Managing Service Delivery' 1998 *Open University Press* (Buckingham and Philadelphia).
- Cooper J and Vernon S, *Disability and the Law*, (London, Jessica Kingsley Publishers, 1996).
- Cotterell R, *The Sociology of Law* (Oxford OUP 1992)
- Dworkin R, *A Matter of Principle* (Oxford, OUP, 1986).
- Doyle B, *Disability Discrimination: Law and Practice*, Bristol, Jordan publishing (2008).
- Ellis E, *EU Anti Discrimination Law* (Oxford University Press, 2005).
- Fredman S, *Discrimination Law*. (Oxford, OUP 2002).pp. 1-3.
- Habermas J, *Between Facts and Norms*, (Cambridge, Polity Press 2010) pp. 1-28.
- Habermas J, *The Theory of Communicative Action: Reason and Rationalisation of Society* (Cambridge, Polity Press, 2004)
- Hepple B, M. Coussey and T. Choudhury, *Equality: A New Framework* (Oxford, Hart Publishing, 2000). p212.
- Hill H and R. Kenyon, *Promoting Equality and Diversity: A Practitioner's Guide*, (Oxford, OUP 2008) p.5.
- Lawson A, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*, (Oregon, Hart Publishing, 2008). pp187-232.
- Marshall C & Grossman, *Designing Qualitative Research* (London, Sage Publications 2006).
- McColgan A, *Discrimination Law Text Cases and Materials* (2edn) (2005) (Richard Townshend Smith).
- McCrudden C, *Buying Social Justice: Equality, Government Procurement & Legal Change* (Oxford, OUP 2007). pp114-121.

- McConville M and Hong Chui W (eds), *Research Methods for Law* (Edinburgh, Edinburgh University Press 2007).
- Monaghan K, *Blackstone's Guide to the Disability Discrimination Legislation* ((OUP 2005) pp158, 296-314.
- Monaghan K, *Equality Law* (Oxford, OUP 2007) pp384-385.
- Mowbray A, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).
- Neuman W.L and Kreuger L.W, *Social Work Research Methods: Qualitative and Quantitative Applications* (Pearson Educational, Boston2003)
- Oliver M, *The Politics of Disablement*. (The MacMillan Press Limited, 1990).
- Oulton K, *Disability Discrimination in Employment*, (Oxford, OUP, 2009).
- Palmer E, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing 2009) pp151-195.
- Pojman L and Westmoreland R, (eds), *Equality: Selected Readings*, (Oxford, OUP 1997).
- Powell M, 'Modernising the Welfare State' in M. Powell(ed) *Modernising the Welfare State* (The Policy Press, 2008) pp1-18.
- Rees T, *Equality in the European Union Education, Training Labour Market Policies* (London, Routledge Publishers, 1998).
- Roche M, *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society*, (Cambridge, Polity Express, 1992).
- Rossmann M, *Designing Qualitative Research* 4<sup>th</sup> ed (London, Sage Publications, 2006)
- Robson C, *Real World Research* (London, Blackwell Publishers, 2002).
- Salter M and Mason J, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Longman, England, 2007).pp. 101 – 102.
- Silverman D, *Doing Qualitative Research: A Practical Handbook* 2<sup>nd</sup> edition (London, Sage Publications 2005) p127.
- Wilkinson R and Pickett K, *The Spirit Level: Why more equal societies almost do better*, (London, Penguin Books, 2009).
- Yin R.K, *Case Study Research: design and methods* (London, Sage Publications 2009).
- Young I, *Inclusion and Democracy* (Oxford, OUP 2002).
- Young I, *The Politics of Difference* (Princeton, Princeton University Press 1990).

## Book Chapters

Akandji-Kombe J, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights' in G. de Burca and B.de Witte (eds), *Social Rights in Europe*. (Oxford, OUP 2005).

Banakar R, 'Studying Cases Empirically: A Sociological Method for Studying Discrimination Cases in Sweden' in R. Banakar and M. Travers(eds) *Theory and Method in Socia-Legal Research*(Oregon, Oxford and Portland, Hart Publishing 2005).

Banks R, 'More than Law: Advocacy for Disability Rights' in M. Jones and L.A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing 1999). pp343-386.

Beirne M, 'Social and Economic Rights as Agents for Change' in C. Harvey(ed) *Human Rights in the Community: Rights as Agents of Change* (Oregon, Hart Publishing 2005) pp43-62.

Beirne M, 'Social and Economic Rights as Agents for Change' in C. Harvey(ed), *Human Rights in the Community, Rights as Agents for Change* (Hart Publishing, 2005) pp43-62.

Bell M, 'Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination' in G. de Burca and B.de Witte (eds), *Social Rights in Europe*. (Oxford, OUP 2005).

Bickenbach J, 'Minority Rights or Universal Participation: The Politics of Disablement' in M. Jones and L.A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing 1999).pp101-116.

Butler F, 'Building a Human Rights Culture' in C. Harvey (ed) *Human Rights in the Community: Rights as Agents of Change* (Oxford & Portland, Oregon, Hart Publishing 2005).pp 63-80.

Clements L and Read J, 'The Dog That Didn't Bark: The Issue of Access to Rights under the European Convention on Human Rights by Disabled People' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe* (Hart Publishing, 2005)

Cooper J, 'Improving the Rights of People with Disabilities through International Law' in J. Cooper (ed) *Law, Rights and Disability* (Jessica Kingsly Publishers, 2000).

Choongh S, 'Doing Ethnographic Research: Lessons from a Case Study' in M. McConville and W.H. Chui (eds) *Research Methods for Law* (Edinburgh University Press, Edinburgh 2007) p70.

Davis L, 'Riding with the Man on the Escalator: Citizenship and Disability' in M. Jones and L.A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing 1999). pp65-74.

Doyle B, 'From Welfare to Rights? Disability and Legal Change in the United Kingdom in the Late 1990s' in M. Jones and L.A. Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing, 1999).pp101-116.

Dobinson and F. Johns, 'Qualitative Legal Research' in M. McConville and W H. Chui (eds) *Research Methods for Law* (Edinburgh University Press, Edinburgh 2007)

Doron I, 'Demographic, Social Change and Equality' in H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*.

D. Michailakis, 'The Standard Rules: A Weak Instrument and a Strong Commitment.' In J Cooper(ed) *Law, Rights and Disability* Jessica Kingsley Publishers, 2000).

De Schetter O, 'Reasonable Accommodations and Positive Obligations in the European Convention of Human Rights,' In A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005). pp35-64.

Fredman S, 'Disability: A Challenge to the Existing Anti-Discrimination Paradigm?' In A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing 2005).pp219-248.

Gooding C and Casserley C, 'Open for all: Disability Discrimination Laws in Europe on Goods and Services' in A. Lawson and C. Gooding(eds), *Disability Rights in Europe: From Theory to Practice*(Oxford, Hart Publishing 2005). pp135-162.

Gori G, 'Domestic Enforcement of the European Social Charter: The Way Forward in G. de Burca and B.de Witte (eds), *Social Rights in Europe*. (Oxford, OUP 2005).

Hendriks A, 'Promoting the Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oregon, Hart Publishing, 2005). pp187-198.

Lawson and C. Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford and Portland, Hart Publishing 2005) pp163-185.

Lodge M, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in J. Jordana and D. Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, Edward Elgar Publishers 2004) pp124-144.

Lawson A, 'The Human Rights Act 1998 and Disabled People: A Right to be Human?' in C. Harvey(ed), *Human Rights in the Community, Rights as Agents for Change* (Hart Publishing, 2005) pp135-154

L. Waddington,' Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion' in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, Hart Publishing 2005. Pp. 106-134.

McCrudden C and Koutouros C, 'Human Rights and European Equality Law' in H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*.

McCrudden C, 'Mainstreaming Human Rights' in C Harvey (ed) *Human Rights in the Community: Rights as Agents of Change* (Oxford & Portland, Oregon, Hart Publishing 2005)pp 9-28.

M. Jones and L.A. Basser Marks, 'Law and the Social Construction of Disability' in M. Jones and L.A Basser Marks (eds), *Disability, Divers-ability and Legal Change*. (Cambridge, Kluwer Publishing, 1999) pp1-24.



O’Cinneide C, ‘A New Generation of Equality Legislation? Positive Duties and Disability Rights’ in A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. (Oxford, Hart Publishing 2005). pp. 219-248.

Quinn G, ‘The Human Rights of People with Disabilities Under the EU Law’ in P. Alston and M. Bustelo and others (eds), *The EU and Human Rights* (OUP, 1999) p. 281.

Quinn G, ‘Disability Discrimination Law in the European Union’ in H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, Cambridge University Press, 2010) pp231-277.

Quinn G ‘The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose’ in G. de Burca and B. de Witte (eds) *Social Rights in Europe* (Oxford, OUP 2005) pp279-304.

Scott C, 'Regulation in the Age of Governance: The rise of the post-Regulatory State' in J. Jordana and D. Levi-Faur (eds), *The Politics of Regulation* (Cheltenham: Edward Edgar, 2004) pp.145-174.

Schoonheim J and Ruebain D, ‘Reflections on Inclusion and Accommodation in Childhood Education: From International Standard Setting to National Implementation’ in A.

Waddington L, ‘Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion’ in A. Lawson and C. Gooding (eds) *Disability Rights in Europe; From Theory to Practice* (Oxford, Hart Publishing 2005) pp115-17.

Spencer S, ‘Partner Rediscovered: Human Rights and Equality in the UK’ in C. Harvey(ed), *Human Rights in the Community: Rights as Agents of Change*, (Oxford, Hart Publishing 2005). p29-42.

Shakespeare T, ‘What is Disabled Person?’ in M. Jones and L.A. Basser Marks (eds), *Disability, Diversity and Legal Change*. Cambridge, (Kluwer Publishing 1999).pp25-34.

## Articles

- Barnes L and Ashtiany S, 'The Diversity Approach to Achieving Equality: Potentials and Pitfalls' Vol. 32, 2003 *Industrial Law Journal December*, pp.274-296.
- Bamforth N, 'Conceptions of Anti-Discrimination Law' 2004, Vol.24 *Oxford Journal of Legal Studies* pp 693-716.
- Beveridge F, Nott S, Stephen K, Mainstreaming and the Engendering of Policy-Making: a Means to an End? 7, 3, 2000, *Journal of European Public Policy*, pp385-405.
- Baylies C, 'Disability and the Notion of Human Development: Questions of Rights and Capabilities' Vol. 17, No. 7, 2002, *Disability & Society* pp. 725-739.
- Collins H 'Discrimination, Equality and Social Inclusion' Vol. 66. 2003 *Modern Law Review*.pp16-43.
- Cotterrell R, 'Why Must Legal Ideas be Interpreted Sociologically?' Vol.25, 1998, *Journal of Law and Society* pp171-92.
- Davies J, 'A Cuckoo in the Nest? A Range of Reasonable Responses,' Justification and the DDA 1995' Vol 32, No.3 *ILJ* 2003. pp164-184.
- Davies J & Davies W, 'Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State', Vol. 29, No. 4, December 2000, *ILJ*. pp 347-377.
- Fredman S, 'Equality: A New Generation?' Vol.30, No.2 2001 *ILJ* pp.145-168.
- Fredman S, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' 21, 2005 *South African Journal on Human Rights* pp163 – 190.
- Fredman S, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' 12, 2005 *Maastricht Journal of European and Comparative Law* pp1-27.
- Foster C, 'Equality Mainstreaming: Turning Theory into Practice' No.110, 2002 *Equal Opportunity Review* pp7-14.
- Fredman S, 'Transformation or Dilution: Fundamental Rights in the EU Social Space' 12 2006 *European Law Journal* pp41-60.
- Fredman S, 'Human Rights Transformed: Positive Duties and Positive Rights' 498, 2006 *Public Law* pp498-520.
- Fredman S and Spencer S, 'Equality: Towards and Outcome Focused Positive Duty' 156, September 2006 *Equal Opportunity Review* pp14 – 19.
- Gooding R. E, 'Welfare, Rights and Discretion' Vol.6, 1986 *OJL*. pp230.
- Hannett S, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination' Vol.23 No.1 2003 *OJLS* pp65-86.
- Holmes E, 'Anti-Discrimination Rights Without Equality' 68, 2005 *Modern Law Review* pp-
- Hughes P, 'Disability Discrimination and the Duty to Make Reasonable Adjustments' 2004 33, 4, *Industrial Law Journal* pp358-366.

- Hale B, 'The Quest for Equal Treatment' 2005 *Public Law* p.571.
- Hepple B and Barnard C, 'Substantive equality' 2000, 59 *Cambridge Law Journal* p566.
- Hughes B, Disability and Society. 'Being Disabled: Towards a Critical Social Ontology for Disability Studies' Vol. 22, No. 7 December 2007. *Glasgow Caledonian University*. Pp 673-684.
- J. Squires, 'Negotiating Equality and Diversity in Britain: Towards a Differentiated Citizenship?' December 2007, Volume 10, Issue 4, [\*Critical Review of International Social and Political Philosophy\*](#). Pp. 531 – 559.
- Moon G, 'From Equal Treatment to Appropriate Treatment: What Lessons can Canadian Equality Law on Dignity and on Reasonable Accommodation Teach the United Kingdom?' 2006 *European Human Rights Law Review* p695.
- Mabbett D, 'Why Have Disability Categories in Social Security?' 11 38, 2003 *Benefits* pp163-8.
- Mabbett D, 'Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy.' Vol. 79, no.1 2008 *The Political Quarterly* pp45-52.
- McColgan A, 'Principles of equality and protection from discrimination in international human rights law.' 2003, *European Human Rights Law Review* pp1-13
- McCrudden C, 'Merit Principles' Vol. 543 No.18 1998 *OJLS* pp559-62.
- McCrudden C, Equality Legislation and Reflexive Regulation: a Response to the Discrimination Law Review's Consultation Paper Vol. 36 *ILJ*. pp255-266.
- O'Cinnede C, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times', Vol. 36, No. 2. 2007 *ILJ* pp141-162.
- Podro S, 'Equality and Diversity: Myths and Misconceptions' No. 159, 2006 *Equal Opportunity Review* pp21-4.
- Powell M, et al, 'Playing the Game of Partnership' 2001, Vol. 13. *Social Policy Review* pp 39-62.
- Rubenstein M, 'Revised Guidance on Disability Definition No. 158, November 2006 *Equal Opportunity Review* pp24-5.
- Sargeant M, 'The Employment Equality (Age) Regulations 2006: A Legitimation of Age Discrimination in Employment' 2006 London *ILJ*. pp209-227.
- Sargeant M, 'Older Workers and the Need for Reasonable Accommodation' 2008 *International Journal of Discrimination Law* pp163-180.
- Sargeant M, 'Disability and Age - multiple Potential for Discrimination, Vol 33, 2005 *International Journal of the Sociology of Law* pp17-33.
- Smith O, 'Disability Discrimination and Employment: A Ever-ending Legal Story?' 2001 23 *Dublin University Law Journal* pp148-74.

- Scott C, 'Accountability in the Regulatory State', 27, 2000, *Journal of Law and Society* pp38-60.
- Schwab S.J and Willborn S.L, 'Reasonable Accommodation of Workplace Disabilities' 44, 2003 *William and Mary Law Review* p1197.
- Van Bueren G, 'Including the Excluded: the Case for an Economic, Social and Cultural Human Rights Act' 2002, *Public Law* pp456-472.
- Wells K, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' Vol.32, No. 4 December 2003 *Industrial Law Journal*.pp253-273.
- Wesson M, 'Equality and Social Rights: An Exploration in Light of the South African Constitution. Winter 2007 *Public law*.pp748-769.
- Waddington L and Hendricks A, 'The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination'18, 2002, *International Journal of Comparative Labour Law and Industrial Relations* pp403-415.
- Whittle R, 'The Framework Directive for Equal Treatment in Employment and Occupation: An Analysis from a Disability Rights Perspective,' 27, 2002 *ELR* p303
- Westen R, 'The Empty Idea of Equality'95, 1982 *Harvard Law Review* pp537-596.
- Witcher S, 'Mainstreaming Equality: The Implication for Disabled People' Vol. 4 1, 2005 *Social Policy and Society* pp55 – 64.
- Zola I, 'Towards the Necessary Universalizing of Disability Policy'67, Suppl.2, 1989 *Milbank Memorial Quarterly*, pp401-428.

## Official Publications/Documents

A Guide to Employment and Support Allowance-The Work Capacity Assessment ESA214, Department for Work and Pensions June 2011. Available at [http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg\\_177366.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@disabled/documents/digitalasset/dg_177366.pdf)

Department of Work and Pensions: Specialist Disability Employment Programme: Government's Response to Liz Sayce's Independent Review of Specialist Disability Employment Programmes, 'Getting in, Staying in and Getting on,' July 2011 CM 8106 available at <http://www.dwp.gov.uk/docs/sayce-response.pdf>.

The Role of Incapacity Benefit Reassessment in Helping Claimants into Employment - House of Commons, Work and Pensions Committee HC 1015, 26 July 2011. available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101502.htm>.

The Equality Act 2010: The public sector Equality Duty Promoting equality through transparency a consultation available at [http://www.equalities.gov.uk/pdf/402461\\_GEO\\_EqualityAct2010ThePublicSectorEqualityDuty\\_acc.pdf](http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf)

Hegewisch A, Flexible Working Policies: A Comparative Review a Research by the Institute of Women's Policy Research. (Equality and Human Rights Commission Research Report 16, 2009) ISBN 978 1 84206 108 4. Also available at [http://www.equalityhumanrights.com/uploaded\\_files/research/16\\_flexibleworking.pdf](http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf)

Sin C.H, et'al, 'Disabled People's Experiences of Targeted Violence and Hostility Research Report: 21 (ECHR 2009) ISBN 978 1 84206 123 7 available at [http://www.equalityhumanrights.com/uploaded\\_files/research/disabled\\_people\\_s\\_experiences\\_of\\_targeted\\_violence\\_and\\_hostility.pdf](http://www.equalityhumanrights.com/uploaded_files/research/disabled_people_s_experiences_of_targeted_violence_and_hostility.pdf)

Leonard Cheshire Foundation, 'Disability Review 2009' compiled by C. Greenhalgh and E.Gore, available at <http://www.lcdisability.org/download.php?id=1381>.

Equality and Human Rights Commission, Work Fit for All – Disability, Health and the Experience of Negative Treatment in the British Workplace, Insight Report 1 Autumn 2008 available at [http://www.equalityhumanrights.com/upload/work\\_fit\\_for\\_all.doc](http://www.equalityhumanrights.com/upload/work_fit_for_all.doc).

Labour market experiences of people with seeing difficulties Secondary analysis of Labour Force Survey data September 2008. Prepared by: Institute for Employment Studies University of Sussex available at [www.employment-studies.co.uk](http://www.employment-studies.co.uk) (accessed March 2010).

Government's Consultation on Improving Protection from Disability Discrimination November 2008 .Available at [www.officefordisability.gov.uk](http://www.officefordisability.gov.uk).

Department for Work and Pensions, Public Consultation. Helping People Achieve their Full Potential: Improving Specialist Disability Employment Services (London, Department for Work, and Pensions, 2007) ch 5.

Disability Rights Commission, Briefing-Discrimination Law Review: A Framework for Fairness (London, DRC 2007).

Disability Rights Commission, The Disability Agenda: Creating an alternative Future. (DRC, February 2007) available at [www.disabilityagenda.org](http://www.disabilityagenda.org). (accessed June 2007)

Equalities Review, Fairness and Freedom (London, Stationary Office, 2007). Available at [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk)

The Equality Standard for Local Government May 2007 available at <http://www.idea.gov.uk/idk/aio/6414524>.

Fairness and Freedom: The Final Report of the Equalities Review (Communities and Local Government Publications, 1 June 2007, Product Code 06DL0440/a, [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk)).

Fawcett G et al, 'Open to Public Scrutiny Involving the Public in Overview and Scrutiny: A Guide for Councillors and Support Officers on Overview and Scrutiny Committees' (OPM 2007) available at [http://www.opm.co.uk/site\\_search?site\\_search\\_keywords=scrutiny](http://www.opm.co.uk/site_search?site_search_keywords=scrutiny)

OPM, Progress on the Equality Standard for Local Government in London Councils: Report for Capital Ambition January 2007 available at [www.opm.co.uk](http://www.opm.co.uk)

Meagel N et al, The ICT Strategy, Disabled People and Employment in the UK, research conducted by The Institute for Employment Studies (IES) University of Sussex March 2007 ISBN: 9 781 85184 383 1.

Barnes C et al Able Authorities? The Disability Discrimination Act, disabled people and local authorities in England (Communities and Local Government July 2006) 06 LGSRU 04027 available at [www.communities.gov.uk/publications/localgovernment/ableauthorities](http://www.communities.gov.uk/publications/localgovernment/ableauthorities)

DRC/OPM, Beyond Good Intentions: A resource for Local Authorities Implementing the Disability Equality Duty 2006, available at [http://www.equalityhumanrights.com/uploaded\\_files/PSD/38\\_beyond\\_good\\_intentions.pdf](http://www.equalityhumanrights.com/uploaded_files/PSD/38_beyond_good_intentions.pdf)

Office of Government Commerce, Social Issues in Purchasing (OGC February 2006). Available at [http://www.ogc.gov.uk/documents/Social\\_Issues\\_in\\_Purchasing.pdf](http://www.ogc.gov.uk/documents/Social_Issues_in_Purchasing.pdf).

The DRC 'Practical Implementation of the Disability Equality Duty within Local Authorities' Survey Report, 2006 Available at <http://www.drc.gov.uk> (Accessed February 2007).

Institute for Public Policy Research, Improving Public Services: Using a Human Rights Approach (2005, London), -----

Prime Minister's Strategic Unit: Improving the life chances of disabled People; Final Report, January 2005.

The European Social and Economic Committee, 2005-10, COM (2005) 33 final, on Social Agenda available at <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.14310>.

Doing the Duty, an Overview of the Disability Equality Duty for the Public Sector (Disability Rights Commission, 2005) [www.dotheduty.org](http://www.dotheduty.org). (assessed May 2007).

McCrudden C, 'Review of Issues Concerning the Operation of the Equality Duty' in E. McLaughlin and N. Faris (eds), *Section 75 Equality Review—An Operational Review* (Belfast, 2004).

Morgan S, 'Equality and Diversity in Local Government in England' (2003). ISBN 1 85112621X Available at the HMSO.

Ross S/CRE, Towards Racial Equality (London, CRE 2003), executive summary available at [www.cre.gov.uk](http://www.cre.gov.uk) (first accessed 28 September 2007).

Audit Commission, Equality and Diversity: Learning from Audit, Inspection and Research (London, Audit Commission, and May 2002) available at <http://www.audit-commission.gov.uk/nationalstudies/localgov/Pages/equalityanddiversity.aspx>.

High Performance Workplaces: The Role of Employee involvement. in a Modern Economy. A DTI discussion paper July 2002 available at <http://www.bis.gov.uk/files/file26555.pdf>.

Equality and Diversity: Making it Happen—Consultation on Future Structures for Equality Institutions (London, The Stationery Office, 2002).

Quinn G and Degener T, 'Human Rights and Disability: The Current use of United Nations Human Rights Instruments in the Context of Disability.' HR/PUB/02/1 United Nations New York and Geneva, 2002.

Meager N and others, 'Costs and Benefits to Service Providers of Making Reasonable Adjustments Under Part III of the DDA' (DWP Research Report No169, 2002) available at <http://research.dwp.gov.uk/asd/asd5/rrep169.pdf>.

Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement (2001/C 333/27).available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:333:0027:0041:EN:PDF>.

Modernising Government, Cm 4310 (London Stationary Office 1999)

Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain - A consultation paper <http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation>

DRC, The Role of Independent Advocacy in Reducing Inequality and Improving the Life Chances of Disabled People: The Disability Agenda-Creating an Alternative Future. Accessed April 2007 [www.drc.gov.uk](http://www.drc.gov.uk).

Home Office, The Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny.CM4262-I1998.

Independent Living: A cross-government strategy about independent living for disabled people. Available at <http://www.officefor disabilities.gov.uk/doc/ind/ilr/summery>.

Equality and Human Rights Commission's Essential Guide to the Public Sector Equality Duty: guidance for English public bodies (and non-devolved bodies in Scotland and Wales), Vol. 1 of 5 Equality Act 2010 available at [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/PSED/essential\\_guide\\_guide.pdf](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/essential_guide_guide.pdf).

## Online Articles.

McGregor J, 'Local Government/Third Sector Partnership: Making Change Happen' An NLGLN available at <http://www.nlgn.org.uk/public/2007/local-governmentthird-sector-partnership-making-change-happen>.

Lockwood R and Lockwood A, 'Literature Review for Captivate: Local Participation for All' February 2007. Available at [www.disability.wa.gov.au/dscwr/assets/captivate](http://www.disability.wa.gov.au/dscwr/assets/captivate) literature (first assessed October 2007).

Spencer S, 'Poverty and Equalities: Closing the Agenda Gap' Speech delivered at the IPPR Conference 'Equalities: Tackling Inequality, Achieving Equalities', 21 November 2007 available at <http://www.edf.org.uk/blog/?p=333>.

Van. Houten D and Bellemakers C, Equal Citizenship for all. Disability Policies in the Netherlands: Empowerment of Marginals' <http://www.ingentaconnect.com/content/routledg/cdso/2002/00000017/00000002/art00005>.

Casserley C, 'The disability Equality Duty and the Public Sector and its Legal Context' 2007 available at [www.drc.gov.uk](http://www.drc.gov.uk) accessed 5 January 2008

Tarpett P and McMahon L, 'Managing Organisational Change: a Management Workbook' (OPM) ISBN: 9781898531 7 available at [www.opm.co.uk](http://www.opm.co.uk).

Southwark council: Sustainable Community Strategy (Southwark 2016) is the main strategic plan for the borough's development. Available at <http://www.southwarkalliance.org.uk/southwark2016>.

Southwark Works Programme information sheet 2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Southwark Works Programme information sheet 2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Witcher S, 'Mainstreaming Equality Theories: Towards a Generic Model of Discrimination,' available at [http://www.creid.ed.ac.uk/events/ESRCseminar1\\_paperswitcher.doc](http://www.creid.ed.ac.uk/events/ESRCseminar1_paperswitcher.doc). (accessed in July 2007).

Witcher S, 'Mainstreaming Equality Theories: Towards a Generic Model of Discrimination', accessed in July 2007, available at [www.creid.ed.ac.uk/events/seminar](http://www.creid.ed.ac.uk/events/seminar);

Acas's experience of equality and diversity in the workplace. A copy of the full report is available at: <http://www.acas.org.uk/CHttpHandler.ashx?id=640&p=0>

Squires J, 'Equality and Diversity: A New Equality Framework for Britain?' Available at <http://philpapers.org/s/JudithSquires> (Accessed April 2007).

Iles V and Sutherland K, 'Managing Change in the NHS, Organisational Change: A Review for Health Care managers, Professionals and Researchers' available at <http://www.comorbidity.org.au/sites/www.comorbidity.org.au/files/ManagingChangeintheNHS.pdf>



## **Southwark Publications.**

Southwark Council Equality and Diversity statement available at [www.southwark.gov.uk](http://www.southwark.gov.uk).(accessed August 2010).

Southwark Compact: An agreement between Statutory Agencies and Voluntary, Community and Faith Organisations in Southwark available at [www.southwark.gov.uk/download/4803/southwark\\_compact](http://www.southwark.gov.uk/download/4803/southwark_compact).

The London Borough of Southwark: Canada Water Action Plan. Employment Back Ground Paper March 2010 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

The Southwark Equality and Human Rights Scheme 2008-11 available at [www.Southwark.gov.uk/info/200041/equality](http://www.Southwark.gov.uk/info/200041/equality) and diversity (accessed April 2009).

Southwark Council, Core Strategy: Employment Back Ground Paper March 2010

Southwark council's 'Delivering Services at Your Door Steps' available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities) (January 2010).

Southwark Council Equality and Diversity Policy 2009 available at [http://www.southwark.gov.uk/info/200041/equality\\_and\\_diversity](http://www.southwark.gov.uk/info/200041/equality_and_diversity).

An Independent Review on the Equality and Diversity Framework of Southwark council' (Lord H Ouseley Report) 2005, p3 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Consultation on Access to Adult Social Care in Southwark, June 30-September 26 2008 available at <http://www.southwark.gov.uk/download/1741/consulation> document.

Equalities Scheme 2005-08, Annex 4: An Introduction to Planning and Carrying Out your Equality Impact Assessment February 2006 available at [www.southwark.gov.uk/www](http://www.southwark.gov.uk/www)

Equality and Human Rights Scheme 2008-11: Executive Summary available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities) (assessed March 2009).

Report on the consultation for the drawing up of the Equality and Human Rights Scheme 2008-2011 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Report on the consultation carried out to inform the making of the 2008-11 Scheme available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities).

Southwark Equality and Human Rights Scheme 2008-11 Annex 4: An Introduction to Planning and Carrying Out your Equality Impact Assessment.

Southwark council's Citizen's Chatter available at [www.southwark.gov.uk/equalities](http://www.southwark.gov.uk/equalities).

Southwark Council's Customer Services Improvement Strategy October 2008.

Southwark Council, Guide to Recruitment available at [www.southwark.gov.uk..](http://www.southwark.gov.uk..)

Southwark Council's Equality and Diversity Statement, available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Southwark council's Customer Service Improvement Strategy 2008(unpublished)

Southwark Council Customer Service – Equal Treatment, Complaints and Arbitration and The Southwark council's Publication Scheme which makes reference to the notion of equal treatment; Available at [www.Southwark.gov.uk](http://www.Southwark.gov.uk).

Southwark Equality Scheme 2005, Annex 5 'Consulting with Diverse and Excluded Communities.'

Your views matter: Consultation paper on access to adult social care in Southwark June-26 September 2008. Available at [http://www.southwark.gov.uk/download/1741/consultation\\_document](http://www.southwark.gov.uk/download/1741/consultation_document). (Accessed October 2008).

Southwark Council's Equality and Diversity Statement and Work Force Strategy 2008-11 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).

Southwark Council, Corporate Plan 2009-11 available at [www.southwark.gov.uk](http://www.southwark.gov.uk)

Southwark Customer Service Delivery Strategy 2008(unpublished).

Southwark Equality Scheme 2005-8, Annex 5: Consulting with Diverse and Excluded Communities.

Southwark Disability Equality Scheme (DES) 2006 available at [www.southwark.gov.uk](http://www.southwark.gov.uk).